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No. 84-277-CFX
Status: GRANTED

Title: Board of Trustees of the Village of Scarsdale, et al., Petitioners
v.
Kathleen S. McCreary, et al.

Docketed:
August 17, 1984

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Frankel, Marvin E.

Counsel for respondent: Schwartz, Marvin, Gilmore, Vincent K.

Entry	Date	Note	Proceedings and Orders
1	Aug 17 1984	G	Petition for writ of certiorari filed.
2	Sep 13 1984		Brief of respondents Scarsdale Chreche Committee, et al. in opposition filed.
3	Sep 13 1984		Brief of respondent Kathleen McCreary, et al. in opposition filed.
4	Sep 19 1984		DISTRIBUTED. October 5, 1984
5	Sep 19 1984	X	Reply brief of petitioner Bd. of Trustees, et al. filed.
7	Oct 15 1984		Petition GRANTED.
			**********
8	Nov 30 1984		Brief amicus curiae of Anti-Defamation League filed.
9	Dec 3 1984		Brief of petitioners Bd. of Trustees, et al. filed.
10	Dec 3 1984		Joint appendix filed.
11	Dec 3 1984		Brief amicus curiae of American Civil Liberties Union, et al. filed.
12	Dec 3 1984		Brief amicus curiae of American Jewish Committee, et al. filed.
13	Dec 28 1984		Brief of respondents Scarsdale Chreche Comm., et al filed.
14	Dec 26 1984		Brief amicus curiae of United States filed.
15	Dec 28 1984		Brief amicus curiae of Catholic League for Religious and Civil Rights filed.
16	Jan 4 1985		SET FOR ARGUMENT. Wednesday, February 20, 1985. (2nd case.)
17	Dec 29 1984		Brief of respondents Kathleen McCreary, et al. filed.
18	Jan 10 1985		CIRCULATED.
19	Jan 28 1985		Record filed.
20	Feb 1 1985		Record filed.
21	Feb 1 1985		Copy of additional portion of original record received.
22	Feb 11 1985	X	Reply brief of petitioners Bd. of Trustees, et al. filed.
23	Feb 20 1985		ARGUED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSINGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARTY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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95 pp

QUESTIONS PRESENTED

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court held that the University of Missouri had violated the Free Speech Clause when, on the stated basis of the Establishment Clause, it denied use of university facilities ("a forum generally open for use by student groups") to students desiring use of those facilities for religious worship and religious discussion. *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), held that the City of Pawtucket, Rhode Island, had not violated the Establishment Clause of the First Amendment when it included a crèche in a display on private land that also contained a Santa Claus house, a Christmas tree and other figures and decorations. The questions presented by this case are:

(1) Whether a municipal governing board, having refused to allow a crèche to be placed in a small public park, should be compelled under the rule of *Widmar v. Vincent* to allow placement of the crèche in the park for the approximately two weeks of the Christmas season.

(2) Whether *Lynch v. Donnelly* shows that the board would not violate the Establishment Clause if it authorized placement of the crèche in the park.

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28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSINGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARTY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 The two groups of respondents brought separate lawsuits, which were consolidated in the District Court and on appeal. The named defendants in the first case, in addition to petitioners herein, were four individual Board members who had voted against respondents' applications to place a crèche or crèches on the public site. By the time of the appeal, three of those Board members had been replaced following expiration of their terms. No formal substitution was made. *See* Fed. R. App. P. 43(c). The Board of Trustees, now seeking certiorari, consists of Mayor Seymour E. Sims and Trustees Martin Bowen, Edward Falkenberg, William R. Glendon, Edward S. Hand, Evelyn H. Seidman and Harriet D. Goldberg. In the circumstances, it has seemed appropriate and sufficient to petition in the names of the Board as such and the Village.

Petitioners, the Board of Trustees of the Village of Scarsdale and the Village of Scarsdale (hereinafter, collectively, "Scarsdale" or "the Village"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on June 21, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-25a) is not yet reported. The opinion of the District Court (App. 26a-61a) is reported at 575 F. Supp. 1112.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, applicable to the States under the Fourteenth, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech. . . .

STATEMENT OF THE CASE

1. The Facts

The facts of the case were presented in a detailed stipulation, accompanying exhibits, answers to interrogatories and deposition testimony. They may be summarized as follows:

Boniface Circle is a plot of land in the center of Scarsdale's business district. Its area is about .075 acres. Deeded to the Village as a park in 1931, its surface is mainly grass. It contains

a war memorial erected in 1949, a flagpole, an evergreen tree, dense hedges, two benches, two lamp posts and a walkway. (J.A. 71-72.)[2]

Over the years, almost no physical signs, symbols or other objects have been displayed in Boniface Circle. For several hours one afternoon in 1961, the Community Fund was permitted to launch its drive by placing a model rocket ship there, but was directed to remove that symbol to another public place for the rest of the eight-day drive (J.A. 93). A Scarsdale High School group held a one-day bake sale and art show there in 1971 (J.A. 90). During several Christmas seasons, Christmas lights have been placed by the Chamber of Commerce on the two Boniface Circle lamp posts, on lamp posts surrounding the Circle and on utility poles throughout the Village (J.A. 78-79). In 1982 the evergreen tree in Boniface Circle was similarly decorated by Village employees; in prior years the Board allowed private groups to decorate Christmas trees on other Village-owned property (J.A. 82-83).

Elsewhere on Scarsdale public lands, in addition to Christmas lights and ornaments, permission has been given to emplace such standard objects and symbols as those of the American Red Cross, the Community Fund rocket ship (for eight days), tables and easels for one-day bake sales, carnivals or art sales, United Fund signs, Cancer Committee swords, Boy and Girl Scout model campsites, and some similarly familiar things (J.A. 88-97). With the exception of the crèche involved herein, none of these physical symbols appears from the record to have been a controversial matter.

In October 1957 the Scarsdale Board granted a request by the Scarsdale Creche Committee for permission to place a crèche (about 6′ at its tallest point by 9′ by 3′ in dimensions, App. 29a) in Boniface Circle, to express "the real significance of Christmas time" (J. Ex. 1). Thereafter, similar requests were granted in each year from 1957 through 1980 to have the

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2 "J.A." refers to the Joint Appendix in the Court of Appeals, "J. Ex." to the Exhibit Volume thereto, and "Stip. Ex." to exhibits included in the stipulated materials in the district court record.

Nativity scene on the Circle for about two weeks (J.A. 53-54). With the trivial exception of electricity for a light bulb in some past years, the cost of the crèche and its display has been borne entirely by the Creche Committee (J.A. 56).

At various times public places and facilities have been made available in Scarsdale for religious services and demonstrations by groups of people (as distinguished from symbols like the crèche resting on public land for periods of days or weeks). These have included Christmas carol sings, at which invocations and benedictions have been offered (J.A. 79-81, 83), Memorial Day prayers at Boniface Circle (J.A. 83), patriotic Independence Day speeches (J.A. 84), religious services by groups of various faiths in Village-owned buildings called Wayside Cottage (J.A. 84-85) and the Crossway Firehouse (J.A. 92), and interfaith vigils and demonstrations in various public parks and streets (J.A. 84, 97), as well as church picnics and block parties (J.A. 88). A room in the public library has been used by religious and other groups for speeches, seminars and the display of various articles, some with religious significance (J.A. 86-87). It does not appear that any of these "live" ceremonies or meetings has drawn objection from anyone in the Village.

Almost from the beginning, however, the placement of the crèche at Boniface Circle each Christmas season has evoked protests—sporadic at first, but increasing over time, so that the crèche has been a "hotly contested" issue in Scarsdale in recent years (App. 30a; J.A. 59-66, 69-70). The controversy, recounted in detail by the District Court (App. 30a-38a), began with protests by Jewish organizations in 1960 and 1963 (J.A. 59-60). These objectants deplored "the injection of religious matters in public affairs" (J. Ex. 5) and asserted, *inter alia*, that "many members of the Jewish community believe that their feelings . . . have been disregarded . . . [in] an area involving a great deal of emotion" (J. Ex. 14). The Board of Trustees, among its other responses to the problem, in 1961 created a Special Committee to study it, later enlisted a professor of human relations as a consultant, and, in the late

1970s, solicited the views of the Scarsdale Human Relations Advisory Council (J.A. 59-60, 62). The Advisory Council, in the years 1976-1982, recommended that the crèche be permitted, but urged toward the end of the period that the Creche Committee should preferably use non-public property as its site (J.A. 63). The Trustees similarly, in the years 1979 and 1980, granted the request but (in 1979) "strongly recommended . . . that the Creche Committee consider rotating the creche among various Village churches [which had offered their property for the purpose] in future years" (J.A. 63, 61) and (in 1980) "strongly urge[d] that next year the Committee erect the creche at a location other than Village-owned property" (J.A. 63).

The objections to the crèche over the years came from both Christian and non-Christian residents. As the parties stipulated (J.A. 69):

> Some residents of Scarsdale who are not of the Christian faith are offended by display of the creche on public property because they believe it to favor the Christian religion and to be offensive and hostile to their different beliefs or non-beliefs. Some residents, both Christian and non-Christian, object to the creche because they perceive the placement of this symbol on public property as giving government sanction to, or support and endorsement of, the religious beliefs thus symbolized. Some, both Christian and non-Christian, object because they perceive the creche on public property as mingling government and religion in objectionable fashion.

Other residents, as was also stipulated (J.A. 69-70), supported the crèche and were offended when in 1981 and 1982 the applications to place it in Boniface Circle were denied:

> Some residents of the Village are offended that the Village has denied permission for the erection of the creche at Boniface Circle. Some of those residents view

> the display of the creche at Boniface Circle as a long standing tradition signifying dedication to peace and goodwill among men and women everywhere. Others view the creche as a symbol of the religious aspects of Christmas. Some residents view the Village's denial of permission to erect the creche as a denial of their right to express or receive a Christmas message or as an official rejection of the message which the creche brings to them.

As the level of controversy rose, it led to a lawsuit in 1976 to enjoin the allowance of a crèche on Boniface Circle, ending in a dismissal on a jurisdictional ground that has since become invalid (J.A. 61).[3] Also in 1976, and for the succeeding four years, the Creche Committee was required to display a sign beside the crèche, saying "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." No dimensions were specified (J.A. 57). The sign used in compliance was visible only from short distances (App. 34a), a condition later deemed by the Court of Appeals to need correction (App. 22a).

1976 was also the year when, as noted above, five churches offered their grounds on a rotating basis as sites for the crèche to avoid the conflict over use of the public site (J.A. 61). Explaining their position, the ten clergymen making the offer issued a statement that said in part (J. Ex. 157):

> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain

3 *Rubin v. Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1977). The dismissal as against the Village was ordered on the basis of *Monroe v. Pape*, 365 U.S. 167 (1961), since overruled in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

> religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.

Other Christian clergymen took an opposite stance, supporting the display of the crèche on public land and later decrying the decision not to permit it (App. 33a; J.A. 62).

While permission for placing the Nativity scene on Boniface Circle continued to be granted through 1980, the unanimity of the Trustees on this subject ended in 1973, when one member abstained. The same member abstained in the following year (another being noted as absent). In 1975, there was a repeat of the abstention, while another member voted "Nay." In 1976, there was a "Nay" vote again and two members noted as absent. The "Nays" increased to two in 1978, three in 1980 and a majority of four in 1981 and 1982. (J.A. 55-56.)

As reflected in the votes of the Trustees, the crèche became a political issue. Candidates seeking election declared their positions on the subject (J.A. 98-99, 100). Voters, including a plaintiff-deponent herein, deemed this a material question in considering how to cast their ballots (J. Ex. 191, 306).

Following denial of permission to display the crèche on Boniface Circle in 1981, there was "a small uproar [in the community] . . . which was refueled the following year when the board again voted to prohibit the creche" (App. 34a). Mayor Jean Stone, whose deciding vote defeated the application, received a large volume of mail pro and con. Much of the mail posed the issue as one of Christian versus Jew (App. 34a-35a; J. Ex. 312-16). Writers in this category appeared to assume, incorrectly, that the Mayor was Jewish (App. 34a; J. Ex. 312); a small portion of her mail was "blatantly anti-semitic" (App. 35a).

In November, 1981, after permission had been refused, the Creche Committee accepted an offer from a restaurant across the street from Boniface Circle and erected the crèche there on December 17, 1981 (J.A. 64). After the 1982 denial, the same

offer was made, and some church properties were also made available. These offers were refused, however (J.A. 66-67).

Explaining the reasons for refusing the church locations, the chairperson of the Creche Committee mentioned that some of the properties offered were not centrally located, some presented topographical problems, and some already had crèches. The "first" and "preeminent" reason for this refusal was, however, that this "would destroy the ecumenical aspect of the Creche Committee" (App. 37a; J. Ex. 278). This reflected, as the District Court found, "that a dominant reason why the Creche Committee has wanted the creche at Boniface Circle is because Boniface Circle is *public* land" (App. 38a; emphasis in original).

The denial of the Creche Committee's request for 1982 was voted (4-3) at a special meeting of the Trustees on December 1, 1982 (J. Ex. 80-83). Thereafter, on December 7, 1982, a new group of individuals, which came to be known as the Citizens' Group, filed an application to place a small crèche on Boniface Circle between December 18 and 26, 1982, stating that this "private personal property . . . should not be confused with the Creche owned by the Creche Committee" (J. Ex. 94). Again by a 4-3 vote, this application was denied on December 14, 1982 (J.A. 57).

The minutes of the Scarsdale Board reflect at least two concerns animating those who voted against allowing the crèche on Boniface Circle: (1) the belief, as expressed by clergymen and others, that the Village land should not be used in this way when the symbol thus sited gave offense to substantial numbers of Scarsdale residents, both Christian and non-Christian (J. Ex. 69-70, 72; Stip. Ex. 54); and (2) the essentially legal position that the display over a period of some two weeks would contravene the Establishment Clause (J. Ex. 71-72; Stip. Ex. 54).

On February 7, 1983, the Citizens' Group, which had never displayed its crèche (App. 38a), brought the first of the two actions consolidated herein, seeking, along with other relief, an

injunction to compel permission for placement of their crèche on Boniface Circle (J.A. 2, 7-18). Recalling the purposes of its application to the Village Board, the Group recited their "desires to join in the Village's celebration of 'Christmas' by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions" (J.A. 15). The Creche Committee filed its complaint on April 28, 1983 (J.A. 6, 27-39).

2. The Decision of the District Court

Having seen that crèches are widely displayed in Scarsdale outside homes and churches (App. 38a), the District Court began its analysis by rejecting the argument of the Citizens' Group that denial of permission for its Nativity scene on Boniface Circle violated the Free Exercise Clause (App. 39a).[4] The Court found "solidly implicated" (App. 39a-40a), however, the plaintiffs' claimed rights under the Free Speech Clause.

Turning to that, the District Court first found that Boniface Circle is "a traditional public forum" (App. 42a), dismissing arguments to the contrary by defendants,[5] and that the denial of the crèche applications was "content-based" (App. 46a). This brought into issue Scarsdale's contention that the denials were justified by a "compelling state interest"— namely, that allowance of the crèche would offend against the Establishment Clause (App. 47a).

Dealing with this argument, Judge Stewart noted at the outset the undisputed proposition that the Nativity scene is a religious symbol (App. 48a). He proceeded then to the lines marked by *Widmar v. Vincent*, 454 U.S. 263 (1981), upon which plaintiffs placed main reliance. Tracking *Widmar*, he pursued the three-pronged analysis of *Lemon v. Kurtzman*,

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4 The argument, eschewed by the Creche Committee, was abandoned by the Citizens' Group as well in the Court of Appeals.

5 These arguments, too, were dropped on appeal.

403 U.S. 602, 612-13 (1971) (App. 50a). He observed in this connection (*id.*) this Court's caution that *Widmar* was to be understood as limited to the particulars of that case, the "basis for [that] decision" being a "narrow" one. 454 U.S. at 273, 277.

In that light, the District Court found the first prong of the *Lemon* analysis—the existence of a valid secular purpose—satisfied in plaintiffs' favor under *Widmar* (App. 51a). As to the concern for "government entanglement," the Judge found the problem "more complex," but concluded that there could not be a finding of Establishment Clause violation "on this ground alone" (App. 51a-52a). The decisive factor amounting to such a violation, he held, was the finding in the circumstances of this case that the two-week sojourn of the crèche on Boniface Circle had a "primary effect" that advances religion (App. 53a).

On this key point, the District Court stressed that religious speakers on the Circle—a rally, a sermon, leafletting—would clearly "run free and clear of the Establishment Clause" (App. 53a). Distinguishing the placement of an unattended symbol from the personal, oral speech in *Widmar*, however, he found that

> when a symbol is placed on public land the land performs an added and enhanced *function*. No longer is the land just a place from which a message can be proclaimed; when a symbol is left on public land the land actually becomes the message bearer. [App. 55a; emphasis in original.]

In determining the effect of a religious symbol "erected and left on public property" (App. 56a), the District Court relied upon this Court's decisions emphasizing the danger in this context of the "appearance" of state sponsorship of religious beliefs or joinder in religious activities (App. 54a-55a). It found the danger realized in this case (App. 56a-58a; emphasis in original; footnotes omitted):

> The record suggests that, in contrast to public gathering uses, people have objected to the creche precisely because an aura of Village approval has adhered to it. Removing this aura of Village approval was the primary concern of the members of Scarsdale's clergy who offered their church properties on an annually rotating basis for display of the creche.
>
> Indeed, cultivating an aura of Village approval is, in our view, one of the factors fueling plaintiffs' desire to have the creche on public property. . . . The Creche Committee has conceded . . . [its] desire to enhance the creche's merely religious message with an 'ecumenical aspect.' . . . Imbuing the creche with an ecumenical appearance . . . would seem to occur *only* if Village land—the property of 'all the people'—is in fact linked in the receiver's mind with the message, since there is nothing inherently ecumenical about the creche standing alone. . . . In contrast to *Widmar*, not only does there appear to be an 'imprimatur of State approval' when the creche sits at Boniface Circle; plaintiffs actually seek it.

The District Court went on to observe that "[t]he advancement problems are not cured by the placement of a sign next to the creche" (App. 59a), referring, *inter alia*, to *Stone v. Graham*, 449 U.S. 39 (1980).

It concluded that the Village was justified in denying both crèche applications "in order to avoid contravening the Establishment Clause" (App. 60a).

3. The Decision of the Court of Appeals

After the decision of the District Court, while plaintiffs' appeals were pending, this Court decided *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). "Based upon the controlling precedents of *Lynch* and *Widmar*" (App. 2a), the Court of Appeals reversed and ordered a remand.

The Court of Appeals agreed with a number of the District Court's findings and conclusions: that the case involves a "public forum," that the Scarsdale Board's decisions were "content-based," that the Nativity scene is "a form of speech" and that the three-pronged analysis of *Lemon v. Kurtzman* was appropriate for this case. The appellate decision also joined in Judge Stewart's views on two of the three prongs, agreeing that the "secular purpose" factor is satisfied under *Widmar* and concluding, somewhat more strongly after *Lynch*, that the circumstances herein did not disclose the kind of "entanglement with religion" (including "potential political divisiveness") comprising an Establishment Clause violation.

The decisive point of disagreement was the Court of Appeals' conclusion that allowing the Nativity scene at Boniface Circle would not "have the direct and immediate effect of advancing religion" (App. 18a). Reviewing a series of this Court's decisions rejecting attacks on state action under the Establishment Clause (App. 18a-19a),[6] the Court of Appeals applied here the conclusion in *Lynch* that, while there would be an advancement effect, it would be "indirect, remote or incidental" (App. 19a). Referring to both *Lynch* and *Widmar* in this appraisal, the opinion says the result favoring the present plaintiffs follows *a fortiori* (*id.*; emphasis in original):

> [T]he city involved in *Lynch* purchased, erected, displayed, sponsored and owned the creche therein. If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the Village's neutral accommodation herein to permit the display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause. As the Court noted in *Widmar*,

6 *Marsh v. Chambers*, 103 S. Ct. 3330 (1983); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Everson v. Board of Education*, 330 U.S. 1 (1947).

> religious benefits derived from the use of an open-access forum are incidental, 454 U.S. at 274, and the availability of benefits to a broad spectrum of groups is an important index of secular effect. *Id.*; *Mueller [v. Allen]*, 103 S. Ct. at 3068. Here, there is no doubt that Boniface Circle is *available* to a broad range of Scarsdale's nonreligious and religious organizations, groups and persons.

As to the question of appearance of public support, the Court of Appeals again found the District Court refuted by *Lynch* and *Widmar* (App. 19a-20a):

> [T]he *Lynch* Court indicated that any perception that Pawtucket had aligned itself with the Christian faith by including the creche in its display was not a primary advancement of religion because the benefits conferred in such a situation are indirect, remote or incidental. *Id.* Moreover, *Widmar* stated that 'an open forum . . . does not confer any imprimatur of State approval on religious sects or practices.' 454 U.S. at 274. Under these principles, the Village's actions in permitting access to Boniface Circle for display of a creche—the same actions that would be necessary in permitting access for any display—do 'not lead it into such an intimate relationship with religious authority that it appears . . . to be sponsoring . . . that authority.' *Roemer*, 426 U.S. at 747-48 (footnote omitted).

The Court of Appeals, while caused "to hesitate" over this (App. 20a), found the record inadequate to ground a distinction from *Widmar* on the exposure of children (rather than university students alone) to the Scarsdale crèche. It also disagreed with the District Court's deprecation of the disclaimer sign, holding, however, that the comparatively inconspicuous sign involved here should be dealt with on remand by "an order concerning the size, visibility and message of an appropriate disclaimer sign or signs" (App. 22a). Further, the Court dismissed Scarsdale's argument that *Lynch* was distin-

guishable on the grounds, among others, that the Pawtucket crèche had been emplaced among a variety of non-religious objects and symbols, and was rested on private rather than public land (*id.*).

The Court of Appeals did not treat the District Court's central attention to (1) the difference in this context between live speakers or demonstrators and a controversial symbol standing alone in a public place for a period of about two weeks, and (2) the plaintiffs' insistence upon the public site as a means of achieving the "ecumenical aspect" of the crèche.

REASONS FOR GRANTING THE WRIT

From the decision in *Lynch v. Donnelly* that a municipality *could* in the special circumstances of that case include a crèche for secular purposes in a Christmas display on private land, the decision below proceeds to its holding that Scarsdale *must* allow such a crèche, standing alone, in a small public park at the Village center. The result is reached by marked extensions of both *Lynch v. Donnelly* and *Widmar v. Vincent*.

The main ground of the decision is a remarkable widening of the free speech rule in *Widmar*. Wholly apart from the Establishment Clause, this calls for review by this Court. Under the reasoning and result of the Court of Appeals, an unattended symbol left standing in the park for two weeks is the same kind of "speech" for this constitutional purpose as the oral expressions of people discussing religion or praying. The consequent order compelling Scarsdale to allow erection of the crèche is a dramatic extension of *Widmar*. If the Court of Appeals is correct in this, which we doubt, it justifies sojourns on public sites of hated symbols—swastikas, burning crosses, vulgar political signs—not less than agreeable ones. Right or wrong, it is a sweeping construction this Court should examine before the *Widmar* rule is permitted to be enlarged in this fashion. At a minimum, the Court should consider the conclusion that *Widmar* leaves no room in which local officials may accommodate conflicting views of their residents on acceptable uses of shared property for sectarian or partisan structures or symbols.

Coming to the Establishment Clause question in *Lynch*, the decision below presents additional reasons for certiorari. Significant differences in law and fact—including some specifically noted, without seeming disagreement, in dissent in *Lynch*, 104 S. Ct. at 1370 n.1—distinguish this case from that narrowly confined decision. Moreover, there is a conflict on the question of religious purpose with *ACLU v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982), *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983). These problems alone, and certainly when added to the vital *Widmar* concerns, warrant review by this Court.

1. In holding that *Widmar* governs this case, the Court of Appeals made no analysis of the marked differences between a crèche (or other symbol of emotionally expressive force) standing on the public place for two weeks, on the one hand, and speakers or discussants using the public forum and then departing, on the other. But the distinction between live speakers and a dramatic symbol rested for days or weeks on public land is a wide one. This Court has marked some of the significant differences. The posting of signs and symbols on public property may be barred even for esthetic reasons when a prohibition against speakers or distributors of leaflets could not stand. *Members of the City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984). The difference between a speaker and a symbol conveying its message steadily from a public site—though both may be broadly "speech"—is notable in law as well as in physical and emotional fact. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) ("We deal here with the law of billboards"). It is the difference between an enduring, seemingly impersonal medium, rooted to the place, and conduct that "continue[s] only while the speakers or distributors remain[ ] on the scene." *Taxpayers for Vincent*, 104 S. Ct. at 2131, citing and quoting from *Schneider v. State*, 308 U.S. 147 (1939).

The context in which a symbol conveys its message—including the significant difference between public and private property—may shape meanings in constitutionally vital respects. *See Spence v. Washington*, 418 U.S. 405, 410 (1974); *cf. Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). The difference is not merely in the quality and duration of the communicative device, but in the profoundly important aspect of *appearance* that has concerned this Court repeatedly in dealing with First Amendment problems. *See Roemer v. Board of Public Works*, 426 U.S. 736, 747-48 (1976); *Stone v. Graham*, 449 U.S. at 42; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982); *Lynch v. Donnelly*, 104 S. Ct. at 1368-69 (Justice O'Connor concurring); *Buckley v. Valeo*, 424 U.S. 1, 236 (1976) (Chief Justice Burger concurring in part and dissenting in part); *id.* at 262, 265 (Justice White concurring in part and dissenting in part); *FCC v. League of Women Voters*, 52 U.S.L.W. 5008, 5020 (U.S. July 2, 1984) (Justice Rehnquist dissenting). The appearance of public sponsorship or endorsement or approval—carefully appraised by the District Court in this case (App. 53a-59a)—was entirely neglected by the Court of Appeals.

Equating a live speaker with a mute symbol left on the public circle for two weeks, the Court of Appeals committed the error of substituting "traditional labels . . . for analysis." *Metromedia*, 453 U.S. at 517 n.23. In this approach, the fact that a Nazi has a right to speak in a public forum, *cf. Smith v. Collin*, 439 U.S. 916 (1978) (Justice Blackmun, joined by Justice White, dissenting from denial of certiorari), would entail mechanically the right to plant a six-foot square swastika on Boniface Circle for a week or so around the anniversary of Hitler's birthday. No more different from protected "free speech" in its usual, oral signification would be a burning cross to express racist views in a largely black village around the holidays in any of the seven States that officially celebrate Jefferson Davis' birthday, a sign in a park in an upstate New York Hasidic village saying "God does not hear the prayers of Jews," a vulgar denunciation of the draft in terms protected by

Cohen v. California, 403 U.S. 15 (1971), or a sign debating religion by displaying a hammer and sickle and the legend "Religion is the opium of the people." The posited examples are signs or symbols that generate rage rather than "a friendly community spirit of good will," *Lynch*, 104 S. Ct. at 1365, in many people. But the principle of the decision below, rested on the Free Speech Clause, extends, obviously, to "freedom for the thought that we hate," *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Justice Holmes dissenting), no less than to thoughts the majority favors or finds agreeable.

The lower court has made of *Widmar* a means to compel the use of municipal property to make some citizens feel excluded from the shared domain or, what is closely similar, to make some support ideas they find "repugnant to their moral, religious, and political beliefs." *Wooley v. Maynard*, 430 U.S. 705, 707 (1977). This reading of *Widmar* brings it into collision—or, certainly, awkward incongruity—with cherished principles of free expression that include protections against compelled expression.

Building upon the foundation of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), those principles protect "all the people" against subsidizing or supporting ideas they reject or oppose or find offensive. A union member's dues may not be used in this fashion. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). An appurtenance as routine as an automobile license plate may not be required to bear, against the owner's will, a message as relatively uncontroversial in its literal import as "Live Free or Die." *Wooley v. Maynard*. The dissent in the last-cited case, if less concerned about the license plate, would free the municipal taxpayer from being required to help support a billboard bearing a message to which he or she was opposed. 430 U.S. at 721 (Justice Rehnquist dissenting).

To many citizens, the village park, a special part of home, is not less precious than the license plate or a billboard. The

municipal park is shared property; as one resident said, echoing the law, it belongs to " 'all the people in the Village' " (App. 35a). *See Clark v. Community for Creative Non-Violence*, 52 U.S.L.W. 4986, 4989 (U.S. June 29, 1984) (Chief Justice Burger concurring). A substantial minority—or a majority, as the non-Christians and Christians opposing the crèche appear to be in Scarsdale—might be thought to enjoy the First Amendment's protection against being compelled to support on their shared land (maintained by everyone's taxes) an inanimate symbol steadily conveying for two weeks a religious (or political or other) message they deem exclusionary or hostile or otherwise repugnant. *Cf. FCC v. League of Women Voters*, 52 U.S.L.W. at 5019, 5020 (Justice Rehnquist dissenting); *id.* at 5021 n.3, 5022 n.7 (Justice Stevens dissenting). If that remains to be demonstrated, it is surely not foreclosed by a routine and unexamined reference to *Widmar v. Vincent*.

2. If nothing more, this case poses in sharp outline the question whether *Widmar* must be read to eliminate any possible latitude for municipal officials in resolving substantive conflicts over the uses of municipal sites for signs and symbols. The decision below says, for example, that if the Pawtucket officials involved in *Lynch* had decided *not* to have a crèche on private land, a group of citizens could have gone to court to compel them to allow one in a public park. There is of course no problem at the extremes. It is common ground that Scarsdale could not erect, or allow erection of, a church or a permanent altar in Boniface Circle. *Tilton v. Richardson*, 403 U.S. 672, 683 (1971). It seems equally clear that a religious speaker could appear with a crèche to deliver his or her message, taking the symbol away when the speech ended. *Cf. O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979). This case is between those, but, in our view, well on the side taken by the District Court.

On principles reviewed in the preceding paragraphs, those who hold the public places in trust for all "the people," *see*

Clark v. Community for Creative Non-Violence, 52 U.S.L.W. at 4986, are not remitted to a mechanical choice between total prohibition, *Taxpayers for Vincent*, and compelled blanket permission for the use of those places for signs and symbols. In this case, where plaintiffs demand "compulsory subsidization" of their religious views, *see Abood v. Detroit Board of Education*, 431 U.S. at 237, by planting and leaving their crèches in the publicly maintained and supported park against protests of a large segment of those who share the park, petitioners urge that the Scarsdale Trustees could conscientiously and constitutionally refuse to accede. That judgment is or should be among the responsible community choices open to the municipal authorities under "the important powers reserved to the people and the States by the Constitution." *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 569 (Chief Justice Burger dissenting).

Undoubtedly, the drawing of delicate lines on a subject like this one for all imaginable instances is not the work of a single case. *Abood*, 431 U.S. at 236. At a minimum, however, it would seem that limits on symbolic communication, or even on political speech, may properly be allowed in cases where the countervailing interests at stake are themselves of constitutional dimension. *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976); *CSC v. Letter Carriers*, 413 U.S. 548 (1973). This is such a case.

The balance struck by Scarsdale's Village Board was, in our submission, justifiable when viewed against the undisputed facts that (1) many crèches throughout the Village already proclaim the desired message, and (2) even for plaintiffs' crèches, other prominent sites are available, lacking only the desired "ecumenical" effect of the compelled public placement. *Cf. Taxpayers for Vincent*, 104 S. Ct. at 2133 ("nothing . . . indicates that the posting . . . on public property is a uniquely valuable or important mode of communication"). In the circumstances, having in view the Trustees' particular knowledge of "local conditions" and "local options", *Elrod v. Burns*, 427 U.S. 347, 386, 389 n.12 (1976) (Justice Powell

dissenting), the Court of Appeals' decision represents a profoundly dubious ordering of the First Amendment values pressed on both sides of the case.

In the course of striking balances among competing First Amendment concerns, this Court has indicated repeatedly the space that is left for national, state and local judgment between what elected officials *may* do and what they *must* do. Within the "room for play in the joints," *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), tax exemptions may be given to religious groups, but they do not appear to be compulsory. *Regan v. Taxation With Representation*, 103 S. Ct. 1997 (1983); *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983). That transportation and textbooks may be supplied to parochial school children, *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968), does not entail that they must be, *Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973); *Leutkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974). Government owned public conveyances may broadcast some kinds of communications, *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), and deny a place for others, especially where permission might trigger "lurking doubts about favoritism." *Lehman v. City of Shaker Heights*, 418 U.S. at 304.

The foregoing comparisons are not perfectly symmetrical. They would seem fairly to recall, however, the relevant need for close and subtle analysis. The testing circumstances of this case present a fitting occasion for clarification by this Court of the principles that should govern the analysis.

3. Reaffirming the necessity for careful "line drawing" in cases of this type, 104 S. Ct. at 1361-62, this Court concentrated on the particular facts in deciding *Lynch v. Donnelly*. *See id.* at 1369-70 (Justice O'Connor concurring, upon "careful judicial scrutiny" of the "unique circumstances"). Significant differences, distinguishing this case, were not adequately appreciated by the Court of Appeals.

— The Nativity scene in *Lynch* was part of a "display" that included a large array of non-religious objects, enumerated by this Court, 104 S. Ct. at 1358, ranging from a Santa Claus house to a teddy bear. This Court's opinion in *Lynch* phrased the problem at least a dozen times as arising from the "inclusion of" or "including" the crèche as one item in a "display" containing the host of merely playful or innocuous figures associated with the secular aspects of Christmas. *See* 104 S. Ct. at 1358, 1362, 1363, 1364, 1365.[7] The Scarsdale crèche, on the other hand, has stood starkly alone in the small (less than one-tenth of an acre) Boniface Circle in the Village center (*see* App. 49a n.14, 60a). As at least four dissenting Justices read the Court's *Lynch* opinion, citing the instant case in the District Court as a comparison, "given the Court's focus upon the otherwise secular setting of the Pawtucket crèche, it remains uncertain whether absent such secular symbols as Santa Claus' house, a talking wishing well, and cut-out clowns and bears, a similar nativity scene would pass muster under the Court's standard." 104 S. Ct. at 1370 n.1. The concurring opinion (*id.* at 1369) concluded that the "display of the crèche in this particular physical setting" was not an endorsement of religion.

— The Pawtucket crèche stood on privately owned land, 104 S. Ct. at 1358, unlike the markedly public Boniface Circle, featuring the War Memorial as its only other structure, to color the "message" of which the land becomes the "bearer"

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7 The majority (*id.* at 1362) and concurring (*id.* at 1369) opinions also emphasized "the overall holiday setting" (*id.*). The signficance of both the narrower and the wider dimensions is a matter for exploration on the merits. For now it seems sufficient, in treating this one among several distinctions, to submit that references to the particular "display" and this Court's repeated enumeration of the many objects cannot be read to have been trivial or immaterial. Compare the observations of the Court of Appeals (App. 23a) that it was "not . . . the physical context within which the display of the creche was situated" but rather " 'the creche in the context of the Christmas season' " (quoting from 104 S. Ct. at 1362) that was decisive in *Lynch*.

(App. 55a). It is the "aura" of the public site that plaintiffs explicitly seek for the impact they deem "ecumenical." In a Village where many crèches on non-public land proclaim the "real significance of Christmas time" (J. Ex. 1), it appears that nothing other than the public mantle makes the public site "uniquely valuable or important" (*Taxpayers for Vincent*, 104 S. Ct. at 2133) for plaintiffs' avowedly identical religious proclamation.

— There was "no evidence of political friction or divisiveness over the crèche in the 40-year history of Pawtucket's Christmas celebration." *Lynch*, 104 S. Ct. at 1365. As a lead plaintiff has acknowledged (J. Ex. 234-35, 251A), the issue has been a fierce one in Scarsdale for years; votes have been sought and cast on this basis (J.A. 98-100; J. Ex. 191, 306); threats and interdenominational rancor have attended the demand that the crèche convey its message on public land in addition to the numerous private sites where crèches abound without dispute or criticism of any kind (J.A. 59-65, 69-70, 98-100, 108-17; J. Ex. 157-206). The record, unlike that in *Lynch*, is replete with what it is permissible to urge "may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." *Lynch*, 104 S. Ct. at 1367 (Justice O'Connor concurring).

— The Pawtucket case came here after the elected city officials had pursued, and this Court then approved, "legitimate secular purposes" for having the Nativity scene as part of its display. 104 S. Ct. at 1363. Here, there are no similar purposes. The elected officials, far from finding such purposes, have disallowed the crèche on contrary findings. The plaintiffs, demanding the public site, have declared and insisted upon their religious purposes for that mode of assertion (J.A. 15; J. Ex. 325-26, 279).

In this last-mentioned aspect the decision below conflicts with *ACLU v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982), *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983). There, a cross erected in a state park

" 'out of religious stirrings and for a religious purpose' " (*id.* at 1391, quoting the district court, 510 F. Supp. at 891) by the Chamber of Commerce was held to violate the "secular purpose" criterion. "Finding that the *Chamber* [had] failed to establish a secular purpose," 678 F.2d at 1391 (emphasis added), the court held that this amounted to an Establishment Clause violation by state authorities who (somewhat ambiguously) had either approved or failed to disapprove the building of the religious symbol on public property.[8] *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans v. Newton*, 382 U.S. 296, 301-302 (1966). In light of the profound doubts raised in connection with *Lynch* and *Widmar*, this conflict serves merely as an additional ground (rather than the sufficient ground it might otherwise seem) for the granting of certiorari.

To be sure, the differences between *Lynch* and this case do not necessarily point in a single direction. Arguably, as the Court of Appeals thought (App. 17a), this case may seem less strong for the claim of an Establishment Clause violation because Pawtucket's officials sponsored their Nativity scene while Scarsdale's Board is "merely" being ordered to allow one. It is not necessary for this petition to argue at length for the position that judicial compulsion is not a lesser concern for this Establishment Clause purpose than executive discretion. *Cf. Shelley v. Kraemer*, 334 U.S. 1 (1948); *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 556 (Chief Justice Burger dissenting) ("federal power—this time judicial power—" overriding local authority). It suffices to say that all the other cited differences in the circumstances appear to weigh decidedly on Scarsdale's side.

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8 The Eleventh Circuit's decision came after, and cited (678 F.2d at 1390 n.20), this Court's ruling in *Widmar v. Vincent*. It does not appear, however, that there was an attempt to justify the maintenance of the cross (a permanent structure) as permissible or required under *Widmar*.

The Court of Appeals failed to make the refined factual analysis called for in this and other First Amendment contexts. *See, e.g., Lynch*, 104 S. Ct. at 1361-62; *id.* at 1369 (concurring opinion); *Lemon v. Kurtzman*, 403 U.S. at 625. It ignored entirely the cogent finding that respondents' "ecumenical" objective is revealed as a purposeful use of the public land for the unconstitutional appearance of governmental joinder in or sponsorship of the religious expression. It dismissed too swiftly, especially in light of Justice O'Connor's concurrence, 104 S. Ct. at 1367, the evidence of deep political divisiveness, giving this historically grave concern no weight at all. *Cf. Lemon v. Kurtzman*, 403 U.S. at 622. It confounded the "secular purpose" of Pawtucket with the distinctly different "secular purpose" (allowing use of a public forum) considered in *Widmar*. There is presented in sum a need to clarify *Lynch* itself and, still more pressingly, to review the striking addition by the Court of Appeals, holding that municipal officials are compelled by *Widmar* to allow religious symbols to stand in public places.

CONCLUSION

The case poses challenging and important problems. The Court's resolution of the questions presented will shed valuable light for all branches of government concerned with problems of access to and use of public facilities.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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Village of Scarsdale

August 1984

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1071—August Term, 1983

(Argued: April 18, 1984 Decided: June 21, 1984)

Docket No. 83-9052

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARTY T. THOMPSON and GREGORY DE SOUSA,

Plaintiffs-Appellants,

—v.—

JEAN STONE, ELISABETH M. BROWN, EDWARD FALKENBERG, BEATRICE K. UNDERWEISER, THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, and THE VILLAGE OF SCARSDALE,

Defendants-Appellees.

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Plaintiffs-Appellants,

—v.—

THE VILLAGE OF SCARSDALE and THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE,

Defendants-Appellees.

Before:

MANSFIELD, PIERCE and PRATT,
Circuit Judges.

PIERCE, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Charles E. Stewart, Jr., *Judge*, entered on December 15, 1983, holding that it was "proper" for defendant-appellee Village of Scarsdale ("Village" or "Scarsdale") to deny plaintiffs-appellants' applications to display a creche in a public park during the Christmas holiday season in order to avoid contravening the establishment clause of the first amendment. *McCreary v. Stone*, 575 F. Supp. 1112, 1133 (S.D.N.Y. 1983). The district court's decision was rendered prior to the Supreme Court's decision in another creche case, *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). Based upon the controlling precedents of *Lynch* and *Widmar v. Vincent*, 454 U.S. 263 (1981), we reverse and remand.

BACKGROUND

In simplest terms, this appeal concerns applications by two groups to place a creche at Boniface Circle, a Village-owned park located in the center of the business district of Scarsdale,

for a period of approximately two weeks during the Christmas holiday season. Plaintiffs-appellants in the first group, twelve in number, are mainly residents of Scarsdale. We will collectively refer to these plaintiffs and other residents who applied to display a creche in Scarsdale on December 7, 1982, as the "Citizens' Group." Plaintiffs-appellants in the second group, seven in number, are either residents of Scarsdale or have a "Scarsdale, N.Y." post office address. They are representatives of plaintiff-appellant The Scarsdale Creche Committee, which is a private unincorported association of seven Catholic and Protestant churches; all of the churches are located in Scarsdale or have a "Scarsdale, N.Y." post office address. Each church contributes approximately twenty-five dollars annually to The Scarsdale Creche Committee to defray the costs of maintaining and displaying one of the subject creches herein. We will collectively refer to these local residents, the churches they represent and The Scarsdale Creche Committee as the "Creche Committee" or as the "Committee."

Scarsdale is a municipal corporation located in the County of Westchester, State of New York. Scarsdale's governing body is known as the Board of Trustees of Scarsdale (the "Board") and usually is elected under a political system known as the Non-Partisan system, in which the Citizens Party nominates candidates for trustees and mayor. The Board governs the affairs of Scarsdale's 17,000 religiously diverse residents.

Among the public properties under the jurisdiction, management and control of the Village and its Board are several parks and other public facilities located in Scarsdale; they include Wayside Cottage, Village Hall, the Scarsdale Public Library, Chase Road Park and Boniface Circle. There are eight "Rules and Regulations Governing Park and Recreation Facilities" that have been in effect in Scarsdale since 1979. These rules state, *inter alia*, that groups desiring use of parks should apply to the Superintendent of Parks, Recreation and Conservation; that groups given permission to use parks should leave them in a clean and orderly condition and will be held responsible for any damage; and that groups using park facilities may be required to obtain public liability insurance. There is no published statute, law, ordinance, rule or regulation in effect

in Scarsdale that requires persons wishing to use Scarsdale's parks or other public properties first to apply for permission from the Board, and there are no published standards upon which the Board bases its decisions to grant or deny applicants permission to use Scarsdale's parks or other public properties. However, Village Code Section 4-1-2 states that "[n]o person shall interfere with, take or use any of the property of the Village without first obtaining the consent of the Village Manager."

It is undisputed that throughout the years covered by this litigation, Scarsdale, acting through its Board, usually granted requests for access to and use of its parks and public properties. Rather than issue a complete denial, on each occasion that it did not grant a specific request, the Board usually chose to approve access to and use of alternative public property. For example, in 1957, the Girl Scouts requested permission to conduct a baked goods sale at Boniface Circle. At the mayor's suggestion, the Board passed a resolution granting permission to the Girl Scouts to use Chase Road for its sale because the Board thought this public location was safer.

It is also undisputed that the Board has granted general use of its parks and public properties for purposes such as speech-making, demonstrating, participating in silent vigils and distributing petitions and other communications. Similarly, the Board has been aware of numerous requests to erect displays on Village-owned property. For example, the Scott Room of the Scarsdale Public Library often has been used for the purpose of exhibiting and displaying articles of an artistic, scientific, literary, civic, cultural, educational or religious nature. Books, miniature military figures, rare stamps and Hanukkah menorahs are among the articles that groups have exhibited and displayed in the library.

Moreover, it is undisputed that Scarsdale has granted access to parks and public properties to groups associated with particular religions. For example, in recent years Scarsdale was aware that Wayside Cottage was the location of religious services by Congregation M'Vakshe Derekh and the Bahai Faith Group. The parties stipulated that the June 23, 1983, edition of the *Scarsdale Inquirer* reported that Congregation

M'Vakshe Derekh was conducting its regular Sabbath services at Wayside Cottage. Wayside Cottage also has been used for a Catholic Mass, a Unitarian wedding ceremony, Bar Mitzvahs and religious services by the Bet Ami Conservative Synagogue. Further, in 1956, the Board granted permission to the Reconstructionist Synagogue of Westchester to use the Crossway Firehouse for the purpose of conducting worship services in September of that year.

Like innumerable local communities, Scarsdale celebrates several holidays during the course of any given year. The holiday that is the center of discussion herein is Christmas. Christmas and Scarsdale's parks and public properties intersect in several ways. For many years, including 1981 and 1982, Scarsdale permitted use of several streets located in the Heathcote, Central Business (which includes Boniface Circle) and Garth Road areas of the Village by the Scarsdale Chamber of Commerce for the purpose of installing and displaying Christmas lights and ornaments. Scarsdale allowed the Chamber of Commerce to display these lights on Village-owned utility poles for approximately one month each year, commencing on or about December 1. Scarsdale also permitted the members of the Chamber of Commerce to broadcast Christmas music in these areas during the time the Christmas lights and ornaments were displayed.

Additionally, for many years, including 1981 and 1982, Scarsdale permitted use of Boniface Circle by the Chamber of Commerce for the purpose of installing and displaying Christmas ornaments for approximately one month each year, commencing on or about December 1, on two lamp posts in Boniface Circle and on the lamp posts directly surrounding Boniface Circle.

In each of the years 1959, 1962 through 1965, and 1968 through 1971, the Village permitted the Town Club, a private group of Scarsdale residents to use Boniface Circle to celebrate Christmas through a Christmas Carol Sing. In 1958, the Town Club held the Carol Sing at Chase Road adjoining Boniface Circle; in 1960, at the public high school in Scarsdale; in 1967, at Chase Road Park. From 1972 through 1981, Scarsdale

permitted use of the plaza outside the entrance to Village Hall, the seat of Scarsdale's local government, for the Carol Sing. Clergymen from local churches offered invocations and benedictions at the Carol Sing in 1959, 1960, 1969 and 1970. In some of the above years, Scarsdale provided Village-owned loudspeakers for use in connection with the Carol Sing, and in 1971, Scarsdale permitted use of platforms from the local high school as well. Also, in some of the above years, the mayor or a member of the Board, upon invitation, attended and welcomed carolers in his or her official capacity. Finally, in 1982, the Village permitted access to Boniface Circle for the Carol Sing. The repertoire of Christmas carols included "The First Noel," "Hark the Herald Angels Sing," "Oh Come All Ye Faithful," "Silent Night," "O Little Town of Bethlehem" and "We Three Kings."

Other examples of Scarsdale's Christmas involvement include allowing Village employees to erect, decorate and display Christmas trees in Village Hall. In 1982, Scarsdale allowed Village employees to install and display Village-owned Christmas lights on the large evergreen tree located in the center of Boniface Circle for approximately two and one-half weeks, and in 1981 and 1982, Scarsdale allowed the Arthur Manor Community Association to install and display Christmas lights and ornaments on a large evergreen tree owned by the Village at Davis Park.

The Scarsdale public property that is central to the dispute herein is Boniface Circle. Scarsdale originally acquired Boniface Circle from the Scarsdale Improvement Corporation in 1931. It is located in the center of the retail business district of the Village and encompasses approximately 3,257 square feet in an oval-shaped configuration. Located inside Boniface Circle is an evergreen tree, approximately thirty-feet tall, two benches, two lamp posts, dense hedges, a walkway and a flagpole at the southern end in an open grassy area. A memorial to the veterans of World War II, which was erected after Board approval in 1947, is located at the northern end of Boniface Circle.

Business and residential properties face Boniface Circle. Among the businesses are restaurants, clothing establishments and a sporting goods shop. Throughout the year, many people frequent Boniface Circle due to its location in the center of Scarsdale's business district.

Beginning in 1956, at the request of four Scarsdale churches, the Board granted permission to place a creche during the Christmas season at Boniface Circle. In 1957, several churches formed the Creche Committee for the purpose of commissioning the sculpting of a wood-carved creche that was to be displayed in Scarsdale during the Christmas season. The completed creche consists of a wooden frame approximately six-feet tall at its peak, dropping off on each end to about three and one-half feet. It is approximately nine-feet long and three-feet deep. An oil painting covers the inside of the frame. Placed inside the wooden frame are nine carved wooden figures that an artist from Scarsdale sculpted at a cost of approximately $1,625. The figures range in height from approximately six and one-half inches to three and one-half feet. When displayed, the figures portray the birth of Christ.

In each year from 1957 through 1982, the Creche Committee submitted a written application to the Board seeking permission to display its creche at Boniface Circle during the Christmas season; from 1957 through 1972, the Board unanimously granted the Committee's applications; from 1973 through 1980, the Board granted the Committee's applications, but minority votes of abstention or denial marked the grants. In 1981 and 1982, the Board voted 4-3 to deny the Committee's requests to display its creche at Boniface Circle.

In each year that the Board granted permission to the Committee to display its creche, the Committee neither solicited nor received any funds or assistance from Scarsdale in connection with the storage, erection, display or removal of the creche. In some years prior to 1977, a 40-watt incandescent light bulb within the creche was connected to a municipal light standard at Boniface Circle. From 1958 through 1980, the Committee restored Boniface Circle to its previous condition after the creche was removed. Until 1980, the Committee's

applications did not specify a duration for the display of the creche. In 1980 and 1981, the Committee requested that the creche be allowed from December 17 to a date of removal "as soon as possible after the New Year." In 1982, the Committee requested the same period, except beginning on December 16. In 1983, the Committee requested permission to display the creche at Boniface Circle during the 1983 Christmas season.

A number of events regarding Scarsdale and the creche began in 1976. First, an attorney and resident of Scarsdale wrote a letter to the Village Attorney indicating that if Scarsdale concluded that the creche could be erected on Village-owned property, he would commence litigation. In December 1976, he did commence an action against Scarsdale and the Creche Committee in the United States District Court for the Southern District of New York seeking a declaration that the placement of the creche on Village-owned property was unconstitutional and an injunction against the Village. The district court dismissed the suit for lack of subject-matter jurisdiction. *Russell v. Town of Mamaroneck*, 440 F. Supp. 607 (S.D.N.Y. 1977) (consolidated with *Rubin v. Village of Scarsdale*).

Also in 1976, the Board, while granting permission to display the creche, required the Committee to display a small unlit sign beside the creche which read: "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." In each year from 1976 through 1980, the Committee complied with the Board's sign requirement. Moreover, beginning in 1976, four churches that had been members of the Creche Committee since at least 1960 discontinued their representation on the Committee. The membership thus dropped from eleven churches to seven churches.

In 1976, the Board, having established a Scarsdale Human Relations Advisory Council for the purpose of advising it with regard to any human relations problems that might arise in the Village, asked the Advisory Council to give its appraisal as to "how the population of Scarsdale feels about using Boniface Circle for locating the creche." From 1976 through 1978, the Advisory Council recommended that, in the interests of community relations, the Board grant permission to the Committee

to display its creche. From 1980 through 1982, although recommending that the Board grant permission to the Committee to use Boniface Circle, the Advisory Council's reports also stated that the creche should be placed on non-public property and that the Committee should seek other sites.

In 1979, the Board, though granting permission to the Committee to erect its creche at Boniface Circle, stated, "It was strongly recommended by all the Trustees that the Creche Committee consider rotating the creche among various Village churches in future years." In May 1980, members of the Committee met with members of the Advisory Council to discuss and consider possible alternative locations for the creche. They discussed two business-district locations, the Frog Prince Proper Restaurant and the Manhattan Bank for Savings; the Advisory Council later informed the Committee that those locations were not available. Later in 1980, the last year that the Village granted permission to the Committee to erect its creche at Boniface Circle, the Village's letter to the Committee stated that "Mayor Jensen pointed out that in light of the division caused by this issue, the Board strongly urges that next year the Committee erect the creche at a location other than Village-owned property."

As stated, 1981 was the first year that the Board denied the Committee permission to place its creche at Boniface Circle. In November 1981, the Frog Prince Proper Restaurant offered its grounds to the Committee for the display of the creche that year. The Committee accepted the offer and erected its creche there on December 17, 1981.

In March 1982, Committee representatives met with former Mayor Jean Stone, the Village Trustees, Village Manager Lowell J. Tooley, members of the Advisory Council, members of the Chamber of Commerce and members of the Scarsdale Police Department to discuss the concept of "Heritage Plaza." The concept was designed to make an area of public land, after transfer to a private entity, available for displays of a patriotic, ethnic, charitable or religious nature as well as for folk-dancing, singing and other social and cultural activities. The plan later proved unworkable.

At a special meeting on December 1, 1982, after its Law Committee reported with respect to the creche issue and the state of the law that "there is no unanimity among members," the Board again voted 4-3 to deny permission to the Committee to erect its creche at Boniface Circle. On December 7, 1982, seventeen residents of Scarsdale, four of whom are members of the Citizens' Group, submitted an application to the Board seeking permission to display a different, smaller creche at Boniface Circle from December 18 through December 26 during the 1982 Christmas season. On December 14, 1982, the Board voted 4-3 to deny the application.

On February 3, 1983, the Citizens' Group submitted an application to the Board seeking permission to display a creche at Boniface Circle from December 17 through December 26 during the 1983 Christmas season. On February 7, 1983, the Citizens' Group commenced an action in the United States District Court for the Southern District of New York seeking damages, declaratory relief and injunctive relief enjoining Scarsdale and the Board from denying the Citizens' Group access to and temporary use of Boniface Circle based upon the content, nature and purpose of the symbolic speech or expression it sought to present in the public park.

On April 12, 1983, the Creche Committee submitted an application to the Board seeking permission to display its creche at Boniface Circle during the 1983 Christmas season. By letter dated April 21, 1983, Scarsdale responded that the placement of a creche at Boniface Circle was the subject of a pending lawsuit and accordingly it was not appropriate to consider the application at that time. On April 28, 1983, the Committee commenced a separate action on essentially the same grounds as asserted in the Citizens' Group's complaint.

On June 15, 1983, the district court consolidated the two actions for all purposes. On June 21, the district court granted a motion for summary judgment in favor of the individual defendant Board members holding that they "are protected by the doctrine of qualified immunity [and therefore] all claims against them for damages must be dismissed." Further, the district court granted a motion for summary judgment as to

two former Board members because they could not provide any of the equitable relief sought.

The case was tried on July 20, 1983, upon a record consisting entirely of stipulated facts, depositions, answers to interrogatories and documentary evidence. On December 8, 1983, the district court issued a thorough opinion granting judgment for the defendants in all respects. *McCreary v. Stone*, 575 F. Supp. 1112 (S.D.N.Y. 1983). This appeal followed.

DISCUSSION

Before framing and discussing the precise issue before this court, it is helpful to discuss briefly several findings and conclusions that the district court made, all of which are uncontested by the parties. First, the district court found that Boniface Circle is a traditional public forum. *McCreary*, 575 F. Supp. at 1123. It reached this conclusion because:

> 1) the Village has never shown an inclination to legally establish or even describe Boniface Circle as anything other than a park of the kind that is traditionally dedicated to First Amendment activities, and 2) the Village's pattern of granting and denying access to Boniface Circle belies the conclusion that it is either a limited public forum or no public forum at all.

Id. The finding that Boniface Circle is a traditional public forum is not clearly erroneous. As Judge Stewart properly noted, Boniface Circle was deeded to the Village in 1931 "for PARK PURPOSES ONLY," and the public since that time has used the park on numerous occasions for a variety of purposes. *Id.* at 1123-24. *See also United States v. Grace*, 103 S. Ct. 1702, 1706-07 (1983)(Parks "are considered, without more, to be 'public forums'.")(citations omitted); *Perry Education Association v. Perry Local Educators' Association*, 103 S. Ct. 948, 954-55 (1983); *Hague v. CIO*, 307 U.S. 496, 515 (1939)(Parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

After thus characterizing Boniface Circle, the district court proceeded to determine whether the denials of access to Boniface Circle to the Citizens' Group or the Creche Committee were content-based or were based on a content-neutral restriction. *See Perry*, 103 S. Ct. at 955 (state may enforce exclusion in a public forum that is content-neutral, that is narrowly tailored to serve a significant governmental interest, and that leaves open ample alternative channels of communication; state may enforce content-based exclusion in a public forum only if it shows that the exclusion is necessary to serve a compelling state interest and is narrowly drawn to achieve that end); *see also Widmar*, 454 U.S. at 270. The district court determined that the denials herein were content-based. *McCreary*, 575 F. Supp. at 1125. This determination is supported by the record. As Judge Stewart wrote, "The record makes clear that the historical concern, and by 1981 the reason for denying access, derived from a feeling that because the symbol was religious it should not be on *any* public land." *Id.* (emphasis in original). The district court also correctly noted, "The second reason for finding that the denial was content-based is that all other applicants who, like plaintiffs, applied only for access to Boniface Circle were referred to other Village-owned property when their applications to Boniface Circle were denied." *Id.* Finally, we agree with the district court's findings that a symbol for first amendment purposes may be a form of speech, *id.* at 1122 n.5 (noting that the Village conceded this point).

The principal issue before us on appeal is whether the Village's content-based denials of the applications to display a creche for a period of approximately two weeks during the Christmas holiday season at Boniface Circle, a traditional public forum, were necessary in order to serve the compelling state interest of avoiding contravention of the establishment clause of the first amendment. The district court, concluding that the denials were proper, *McCreary*, 575 F. Supp. at 1133, reached its conclusion by partially distinguishing this case from *Widmar v. Vincent*, 454 U.S. 263 (1981). Of importance, however, is that the district court at that time did not have the

benefit of *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), a creche decision with major impact on this litigation. We disagree with the district court's analysis of *Widmar* in light of *Lynch*; therefore, we reverse and remand.

The first amendment to the United States Constitution states in pertinent part that "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . . ." The first amendment, of course, is applicable to the states. *Everson v. Board of Education*, 330 U.S. 1, 8 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court recently has written that the establishment-clause language in the first amendment "is not a precise, detailed provision in a legal code capable of ready application," and that "[t]he purpose of the Establishment Clause 'was to state an objective, not to write a statute.' " *Lynch*, 104 S. Ct. at 1361-62 (quoting in part *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)). Over the years, establishment-clause cases have presented "especially difficult questions of interpretation and application," *Mueller v. Allen*, 103 S. Ct. 3062, 3065 (1983). In this case, we are faced with the additional difficulty of reconciling establishment-clause issues with free-speech issues; however, the recent Supreme Court precedents of *Widmar* and *Lynch* help us to "perceive the lines of demarcation," *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), in these important areas of constitutional law.

In *Widmar*, eleven students of the University of Missouri at Kansas City brought suit to challenge a University regulation that prohibited their religious group from meeting in University facilities as other student organizations did. 454 U.S. at 265-66. The Supreme Court, Justice Powell writing, announced that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68. Noting that religious worship and discussion "are forms of speech and association protected by the First Amendment," *id.* at 269, the Court stated that "[i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the

University . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 269-70.

The University in *Widmar* contended that its regulation was necessary to serve the compelling interest of maintaining separation of church and state as required by the establishment clause. *Id.* at 270. The Court agreed that such an interest "may be characterized as compelling," *id.* at 271, but that an equal-access policy would not contravene the establishment clause. *Id.* Referring to the guidance of the three-pronged test established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Court noted "that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion." *Widmar*, 454 U.S. at 271-72 (footnotes omitted). Moreover, the Court concluded that the primary effect of the public forum would not be the advancement of religion. *Id.* at 273. As to the latter conclusion, the Court explained that incidental benefits do not violate the prohibition against primary advancement of religion, *id.*; that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," *id.* at 274; and that the forum in dispute was available to benefit "a broad class of nonreligious as well as religious" groups, *id.* Finally, the Court held that the University's interest was not "sufficiently 'compelling' to justify content-based discrimination against [the student group's] religious speech," but that "this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations." *Id.* at 276 (footnote omitted).

Less than three years after *Widmar*, the Supreme Court decided *Lynch*. In *Lynch*, the City of Pawtucket, Rhode Island, erected a Christmas display as part of its observance of the Christmas holiday season. The display included figures traditionally associated with the holiday such as a Christmas tree, a Santa Claus house and a virtually life-sized creche. 104 S. Ct. at 1358. The City not only erected and later dismantled the creche, it owned the creche—having originally purchased it—and, in addition, incurred nominal expenses in displaying it

each year. *Id.* Several Pawtucket residents and others brought an action challenging the City's inclusion of the creche in the Christmas display. Beginning with the acknowledgement that total separation of church and state in the absolute sense is not possible, *id.* at 1358-59, and that the Constitution affirmatively mandates accommodation of all religions, *id.* at 1359, the Court focused on the creche "in the context of the Christmas season." *Id.* at 1362. Chief Justice Burger wrote:

> The District Court plainly erred by focusing almost exclusively on the creche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.

Id. at 1362-63. Additionally, the Court noted that the inclusion of the creche did not give aid to religion that was any greater than the benefits and endorsements approved in other Supreme Court establishment-clause cases. *Id.* at 1364. It stated:

> We can assume, *arguendo*, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid."

Id. (quoting in part *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)). Moreover, the Court rejected arguments that the City's display of the creche involved forbidden entanglement by the state with the church, *Lynch*, 104 S. Ct. at 1364, and also decided that an inquiry into potential political divisiveness was not necessary because the dispute did not involve direct subsidies to church-sponsored schools, colleges, or other religious institutions. *Id.* at 1364-65. Finally, the Court held that "notwithstanding the religious significance of the creche," the City did not violate the establishment clause. *Id.* at 1366.

In light of the Supreme Court's dispositions of *Widmar* and *Lynch*, we turn now to the instant dispute. Initially, the Creche Committee raises an issue concerning the proper mode of analysis. It argues that the *Lemon* three-pronged analysis should not be used for guidance by this court. We disagree. The *Lemon* test asks whether governmental conduct in an establishment-clause case has a secular purpose, whether the principal or primary effect of that conduct advances or inhibits religion and whether the conduct will foster an excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612-13. It is settled that if one prong of the test is breached, the challenged governmental conduct will violate the establishment clause. *See, e.g., Stone v. Graham*, 449 U.S. 39, 40-41 (1980)(per curiam). The *Lemon* test generally has guided courts in the establishment-clause area, *Mueller*, 103 S. Ct. 3066, although the Supreme Court has warned that in this area it will not be bound by a single test. *Lynch*, 104 S. Ct. at 1362; *see, e.g., Marsh v. Chambers*, 103 S. Ct. 3330 (1983); *Larson v. Valente*, 456 U.S. 228 (1982). We believe that the district court proceeded correctly by applying the *Lemon* test and we will also use it for guidance. We note that the Supreme Court used the test for guidance in *Lynch*, 104 S. Ct. at 1362, and in *Widmar*, 454 U.S. at 271, and that our court previously has used the test for guidance. *See Brandon v. Board of Education*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

The first prong of the *Lemon* test asks whether the government's conduct in allowing the display of a creche has a secular purpose. Judge Stewart determined that allowing a creche would not violate the establishment clause for want of a secular purpose. *McCreary*, 575 F. Supp. at 1128. We agree. *Widmar* teaches that pursuing an open-forum policy that allows equal access for religious as well as nonreligious speech is an acceptable secular purpose. *Widmar*, 454 U.S. at 271. As the district judge noted, *Widmar* is controlling on this prong; therefore, we agree with his resolution.

The excessive-entanglement prong of the *Lemon* test asks whether the government's conduct in allowing the display of a

creche will foster excessive governmental entanglement with religion. "Entanglement is a question of kind and degree." *Lynch*, 104 S. Ct. at 1364. The district judge herein determined that *Widmar*'s admonition, that *enforcing* an exclusion would involve some entanglement, was appropriate because the Village then would have to determine which symbols presented to it are principally religious. *McCreary*, 575 F. Supp. at 1128. Further, the district judge determined that the potential-political-divisiveness part of the excessive-entanglement prong was insufficient to constitute an establishment-clause violation. *Id.* at 1129. We agree with these observations. First, merely allowing access to display a creche would not foster excessive administrative entanglement. In reality, when evaluating an application for display of a creche, the Village will have to do no more than when evaluating any other request for access to its public properties. Further, allowing access would not involve continuing state surveillance, which might be necessary if financial grants were involved, *Lemon*, 403 U.S. at 621, or which might be necessary to ensure compliance with rules excluding religious speech. *Widmar*, 454 U.S. at 272 n.11. Additionally, the Village's involvement here would be far less than the involvement of Pawtucket, the sponsor of the creche in *Lynch*. *See* 104 S. Ct. at 1358.

Lynch has resolved any doubt that may have existed about the district court's resolution of the potential-political-divisiveness contention that the Village continues to emphasize here on appeal. Following a footnoted reference in *Mueller*, 103 S. Ct. at 3071 n.11, *Lynch* specifically limited the potential-political-divisiveness part of the excessive-entanglement prong to cases involving direct subsidies to church-sponsored schools, colleges or other religious institutions. *Lynch*, 104 S. Ct. at 1364-65. Plainly, this is not such a case. Further, *Lynch* pointed out that potential political divisiveness may not be permitted to invalidate otherwise permissible conduct. *Id.* at 1364. Justice O'Connor, in her concurring opinion stated that "political divisiveness along religious lines should not be an independent text of constitutionality." *Id.* at 1367. Thus, even though it was without benefit of *Lynch*'s guidance in this area,

we believe that the district court reached the correct conclusion as to excessive entanglement, namely, that this prong of the *Lemon* test was not violated herein.

The primary-effect prong of the *Lemon* test is violated only if the governmental action has "the direct and immediate effect of advancing religion." *Nyquist*, 413 U.S. at 784 n.39. "Comparisons of the relative benefits to religion of different forms of governmental support are elusive and difficult to make." *Lynch*, 104 S. Ct. at 1363. However, governmental action that provides only indirect, remote or incidental benefits does not violate the establishment clause. *Nyquist*, 413 U.S. at 771. Not surprisingly, our prime area of disagreement with the district court relates to its analysis of this prong because it is with respect to this prong that *Lynch* has its major impact. The district court determined that *Widmar* did not control the primary-effect prong because *Widmar* involved speakers using public property. *McCreary*, 575 F. Supp. at 1129-30. According to the district court, the crucial inquiry in this case was whether "the manner chosen by the plaintiffs to convey their religious message sufficiently relies on the 'prestige, power and influence' of the Village to constitute an impermissible state advancement of religion." *McCreary*, 575 F. Supp. at 1130 (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring)). Using this approach, the district court determined that allowing plaintiffs' creche to stand ten or so days at Boniface Circle would have the direct and immediate effect of advancing religion.

We disagree. In *Lynch*, the Court determined that the display of the creche did not advance religion in general or the Christian faith in particular any more than those benefits and endorsements found not violative of the establishment clause in other Supreme Court cases. 104 S. Ct. at 1363-64. *See Marsh v. Chambers*, 103 S. Ct. 3330 (1983) (chaplain opening state legislative sessions paid with public funds); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (plurality opinion) (aid to private institutions of higher learning); *Tilton v. Richardson*, 403 U.S. 672 (1971) (construction grants); *Board*

of Education v. Allen, 392 U.S. 236 (1968) (free textbooks); *Zorach v. Clauson*, 343 U.S. 306 (1952) (program allowing release of students during school hours for religious instruction); *Everson v. Board of Education*, 330 U.S. 1 (1947) (school transportation). The Supreme Court in *Lynch* acknowledged that the display of the creche would advance religion "in a sense," 104 S. Ct. at 1364, but determined that the effect was indirect, remote or incidental. *Id.* As we noted earlier, the city involved in *Lynch* purchased, erected, displayed, sponsored and owned the creche therein. If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the Village's neutral accommodation herein to permit the display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause. As the Court noted in *Widmar*, religious benefits derived from the use of an open-access forum are incidental, 454 U.S. at 274, and the availability of benefits to a broad spectrum of groups is an important index of secular effect. *Id.*; *Mueller*, 103 S. Ct. at 3068. Here, there is no doubt that Boniface Circle is *available* to a broad range of Scarsdale's nonreligious and religious organizations, groups and persons. The district court stated that it did not believe that a broad class of nonreligious and religious symbols will abound in Scarsdale's parks. *McCreary*, 575 F. Supp. at 1132. However, this belief does not lessen the opportunities for free-speech usage of Scarsdale's public forums, including Boniface Circle. Further, we reject as sheer conjecture any implication that the Village will be overrun with applications for use of the limited space in its public forums. As we will discuss later, the Village has the freedom to enact reasonable, content-neutral time, place and manner regulations regarding the use of its public forums.

The district court also attached emphasis to how the creche would *appear* when placed on Village property. *McCreary*, 575 F. Supp. at 1131-33. In *Lynch*, the majority rejected an argument based on appearance advanced by the dissent. 104 S. Ct. at 1364. As previously stated, the *Lynch* Court indicated

that any perception that Pawtucket had aligned itself with the Christian faith by including the creche in its display was not a primary advancement of religion because the benefits conferred in such a situation are indirect, remote or incidental. *Id.* Moreover, *Widmar* stated that "an open forum . . . does not confer any imprimatur of State approval on religious sects or practices." 454 U.S. at 274. Under these principles, the Village's actions in permitting access to Boniface Circle for display of a creche—the same actions that would be necessary in permitting access for any display—do "not lead it into such an intimate relationship with religious authority that it appears . . . to be sponsoring . . . that authority." *Roemer*, 426 U.S. at 747-48 (footnote omitted). Additionally, we note that the appearance aspect in this case exists to a much lesser degree than the appearance aspect discussed by the Court in *Lynch*, 104 S. Ct. at 1364 ("display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself").

Finally, the district court also concluded that the appearance of Village support was a problem because "the community viewing the creche includes children who cannot be counted on to 'appreciate that the [Village's] policy is one of neutrality toward religion.' " *McCreary*, 575 F. Supp. at 1132 (quoting *Widmar*, 454 U.S. at 274 n.14). We reject this basis for the district court's holding. This contention causes us to hesitate; however, assuming there is a reason for articulating principles vis-a-vis children separate from those that we have stated above in relation to primary advancement of religion, the record herein contains "little direct testimony," *McCreary*, 575 F. Supp. at 1128 n.16, on which to base such a distinction. We note that the Village did not even introduce the kind of evidence that other courts have considered regarding such a theory. *See, e.g., Country Hills Christian Church v. Unified School District No. 512*, 560 F. Supp. 1207, 1216 (D. Kan. 1983) (no studies done regarding theories on children; therefore, psychologist's testimony considered speculative); *Citizens Concerned for Separation of Church and State v. City and*

County of Denver, 526 F. Supp. 1310, 1314-15 (D. Colo. 1981) (district court considered evidence presented on the effect of a nativity-scene display on children inconclusive; evidence consisted of expert psychological testimony and a study performed on children).

Another appearance aspect of this case concerns the disclaimer sign placed beside the Committee's creche from 1976 through 1980 as a condition for authorization to display the creche at Boniface Circle. The sign measured 10 3/4 inches by 14 1/2 inches, contained letters 1/2 inch high, was unlit and read: "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." *McCreary*, 575 F. Supp. at 1118. The district court was of the view that disclaimer-sign details were "minutiae" and, based on its "land as the message bearer" theory, hypothesized that primary-advancement-of-religion problems would not be cured because "it is doubtful that a sign saying that a symbol has been 'erected and maintained' by a private group will entirely eliminate the appearance of state support when public land is still the one visible thing to which the speech may be attributed." *Id.* at 1132-33. Our view differs. First, *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), cited by the district court, is inapposite. In *Stone*, the Court determined that the government did not have a secular purpose for the display of the Ten Commandments in a public school. *Id.* at 41. Here the Village has a secular purpose and public schools are not involved. However, we think there is some basis for the district court's concern that while a creche on public land would be visible, the subject sign would not. Therefore, we do not believe that the disclaimer sign should be rejected entirely as a device to further ensure that the creche display will not be attributed to the Village. As the Citizens' Group points out, *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973) (per curiam), is instructive. In *Allen*, the court determined that a creche would not violate the establishment clause if acompanied by appropriate plaques indicating that the government did not sponsor the event involving the creche. *Id.* at 67. The court emphasized that the "plaques should be designed for maximum exposure

and readability." *Id.* at 90 (Leventhal, J., concurring). That court noted that the district court, if necessary, should enter an injunction requiring the posting of appropriate plaques. *Id.* In addition to *Allen*, the Supreme Court has made reference to disclaimer signs as a proper means of diminishing the likelihood of appearance of support. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (connection with message can be disavowed by "simply posting signs"); *see also Lynch*, 104 S. Ct. at 1376 (Brennan, J., dissenting). We believe that a proper disclaimer message—especially when coupled with the presence of the valid secular purpose, the lack of excessive entanglement, the Village's general grants of access to its public properties and the publicity the Village's official views have received in Scarsdale—will ensure that no reasonable person will draw an inference that the Village supports any church, faith or religion associated with the display of a creche during the Christmas season at Boniface circle. Therefore, on remand, we instruct the district court to conduct proceedings and to enter an order concerning the size, visibility and message of an appropriate disclaimer sign or signs. While we leave the details to the district court's discretion, we note that the sign heretofore displayed appears to us to be too small. As the district judge noted, "It appears that the sign was not readable by persons standing on the perimeter of the park or traveling past Boniface Circle in a car, although the creche could have been recognizable from such at either point." *McCreary*, 575 F. Supp. at 1118-19. We have no reason to think that this observation is clearly erroneous. Fed. R. Civ. P. 52(a).

The Village attempts to distinguish *Lynch* from the subject situation by referring to *Lynch*'s reference to the Pawtucket creche as presented in the context of "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights [and] a large banner that reads 'SEASON'S GREETINGS'." 104 S. Ct. at 1358. We reject this distinction for two reasons. To begin with, assuming *arguendo* that the Village's interpretation is correct, the Christmas celebration in the

Village is not significantly different than the Christmas celebration described in *Lynch*. In Scarsdale, the Village is decorated with many traditional symbols of Christmas. Moreover, Boniface Circle has been the recent site of the Christmas Carol Sing and the site of numerous Christmas decorations. More importantly, the Village's reading of *Lynch* is erroneous as applied to this case. The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the creche was situated; rather, the Court consistently referred to "the creche in the context of the Christmas season," *id.* at 1362, or the "Christmas Holiday season," *id.* After determining that the proper context for analysis was the Christmas season, the Court noted:

> To forbid the use of this one passive symbol—the creche—*at the very time people are taking note of the season* with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Lynch, 104 S. Ct. at 1365 (emphasis added). Thus, the Village's display-context argument fails.

The Village also contends that *Lynch* is distinguishable from this case because the creche in *Lynch* was displayed on private land. We also reject this contention. We fail to find substantiality in this asserted private/public land distinction when comparing the creche in *Lynch* with either creche in this case. The Pawtucket creche had been displayed for forty or more years with active involvement by the government, including funding, albeit modest in amount, and sponsorship by the city. Here, the Village would merely accommodate a privately-owned creche in a public park that is a traditional public forum. Further, there is no proposed active involvement, sponsorship or financial support by the Village. The cases referred to by the

Village, and cited in Justice Brennan's dissent in *Lynch*, 104 S. Ct. at 1370 n.1, are not applicable to this case. *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (per curiam), involved a permanent religious display on public property. The display of the creche herein in the context of the Christmas season for approximately two weeks falls short of the permanency referred to in *Rabun*. *Id*. at 1101-02. Moreover, *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981), concerned a special platform constructed for the Pope to celebrate Mass and to deliver a message to the people of the City of Philadelphia, and involved a substantial financial commitment by the city of over $200,000. 637 F.2d at 927. In addition, the court there determined that the city's actions were undertaken with a religious purpose, *id*. at 930, that the religious effect of the city's actions was "plain and primary," *id*. at 931, and that the city had become entangled with religion when preparing the platform, *id*. at 932. None of these factors is present herein and thus *Gilfillan* is inapposite. Finally, *Fox v. City of Los Angeles*, 22 Cal.3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (in bank), is also not helpful to the Village's position. In *Fox*, the city illuminated on its city hall a huge cross to honor Christmas and Eastern Sundays (Latin and Eastern Orthodox). 587 P.2d at 663-64. There the city acted at its own initiative, *id*. at 671 (Bird, C.J., concurring), it placed the cross in position at public expense, *id*., and it identified itself with the Christian religion, *id*. at 670. Again, none of these factors is present herein.

We have noted that establishment-clause cases should be evaluated according to the particular facts before the court. *Brandon*, 635 F.2d at 973. Adhering to that instruction, we take care to emphasize the narrowness of our ruling and hold only that the Village would not contravene the establishment clause by allowing the display of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season. We point out that the problem with the prohibition herein existed because it was

content-based. Our ruling does not affect the ability of the Village to establish reasonable time, place and manner restrictions regarding the use of its public properties, including Boniface Circle. *See Widmar*, 454 U.S. at 276 & 276 n.19. The crucial inquiry in this area is whether the "manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). If the manner of expression is compatible, the state may impose "reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication'." *Grace*, 103 S. Ct. at 1707 (quoting *Perry*, 103 S. Ct. at 955).

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court. We remand for the entry of an injunction prohibiting the Village from relying on the establishment clause as a reason for prohibiting the erection of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season; for action regarding a disclaimer sign or signs; and for other such action as is consistent with our determination herein.

Reversed and remanded.

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 987 (CES)

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGAR, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DESOUSA,

Plaintiffs,

—against—

JEAN STONE, ELISABETH M. BROWN, EDWARD FALKENBERG, BEATRICE K. UNDERWEISER, THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Defendants.

83 Civ. 3266 (CES)

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Plaintiffs,

—against—

THE VILLAGE OF SCARSDALE and THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE,

Defendants.

STEWART, *District Judge:*

In these cases we are asked to decide whether defendants, the Village of Scarsdale (the "Village"), its governing board of trustees (the "board of trustees" or the "trustees" or the "board") and, in 83 Civ. 987, two individual trustees,[1] acted within the bounds of the Constitution in denying access to a Village-owned park for the purpose of displaying a privately owned "creche" or nativity scene. There are two groups of plaintiffs (collectively they will be referred to as the "plaintiffs") in this consolidated action. The plaintiffs are known as the Scarsdale Creche Committee (the "Creche Committee") and the Citizens Group. Plaintiffs bring their claims pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983 asserting a denial of free speech and free exercise rights as guaranteed by the First and Fourteenth Amendments. The Creche Committee also alleges a denial of equal protection. Plaintiffs seek both a declaration that their rights have been denied and a permanent injunction against further denials. The case was tried on July 20, 1983 and the record consists exclusively of stipulations of fact, depositions, answers to interrogatories, and exhibits. The parties do not dispute the authenticity of any documents submitted as exhibits, and have agreed that the depositions and answers to interrogatories may be received in evidence as if given as testimony at trial. Jurisdiction is premised on 28 U.S.C. §§ 1331 and 1343(3). This opinion sets forth the court's findings of fact and conclusions of law.

I. BACKGROUND

The Village of Scarsdale is a municipal corporation located north of New York City in the County of Westchester. It has a population of about 17,000 people, Tooley dep. at 38, and its residents include persons of varying religious faiths.[2]

1 In a memorandum decision dated July 20, 1983, this court dismissed damage claims against the four individually named defendants, and insofar as they were no longer trustees, dismissed all equitable claims against defendants Stone and Brown.

2 Although the parties have not stipulated as to the religious composition of the Village, the record in varying places suggests that the community

In 1931 a small plot of land, which has come to be known as Boniface Circle, was deeded to the Village of Scarsdale. Boniface Circle is one of a number of parks in the Village. It has a dimension of 3,255 square feet, is bounded on all sides by roadways and is surrounded by both residential and commercial property, the latter including professional offices, a restaurant, and sporting goods, clothing (for men, women and children), grocery, and other stores. The park is oval in shape, largely grass-covered, and is considered to lie in the center of the retail business district of the Village.

Located in the park are a large evergreen tree, various hedges, two benches, two lamp posts, a walkway and a flagpole. Also located in the park is a war memorial to the veterans of World War II. The war memorial, built in 1949, consists of a stone wall on which plaques recalling the names of war dead are mounted. In front of the wall is a small terrace of flagstones and some steps leading up to the slightly higher ground level of the rest of the park. The entire memorial occupies about one-sixth of the park. Boniface Circle is visited year round by persons of "all stripes", *id.* at 84, for what appear to be varying reasons, among them as a way-through for pedestrians from one street in the business district to another. Parking meters surround about half of the park.

Over the years access to Boniface Circle for assembly or speech purposes has been somewhat limited. A detailed description of such uses is set out below in the portion of this opinion discussing Boniface Circle's status as a "public forum." Suffice it to say here that applications for its use for First Amendment purposes have historically been passed upon by the board of trustees, the Village's governing body, that there are no statutes or regulations setting forth guidelines upon which the board bases its decision to grant or deny access, and that there are no statutes or ordinances which otherwise set forth guidelines as to how and when Village property may be used for such purposes.

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of Scarsdale includes adherents of Christian, Jewish, and several "Eastern" religious faiths. The Village also has a Mormon Church and followers of the Bahai faith and several newer religions such as that of the Reverend Moon.

One of the primary uses to which Boniface Circle has been put is as a locus for Christmas celebration. Every year the Village has allowed the Chamber of Commerce to decorate the two lamp posts in the park and the lamp posts surrounding it with ornaments of various kinds. The Town Club, a private organization, has been granted access to Boniface Circle in 1959, 1962 through 1965, 1968 through 1971 and in 1982 to hold a Christmas Carol Sing. On other occassions the Town Club has met on other Village-owned property for caroling. In 1982 the Village itself installed Christmas ornaments on the large evergreen tree in Boniface Circle, and displayed them for two and one-half weeks. And, beginning in 1956 and continuing through December 1980, Boniface Circle has been the site of a privately owned creche, displayed for about two weeks each year.

From 1957 through 1980 the sponsor of the creche display has been the Creche Committee. The Creche Committee is a private unincorporated association of seven Protestant and Catholic churches. Five of the churches are located in the Village of Scarsdale and two are located outside the Village but have a "Scarsdale, N.Y." post office address. Each church is represented on the Committee by one person and each pays a small annual donation to defray the cost of maintaining and displaying the creche. Except for a period prior to 1977 when the Village paid for the electricity to light a small light bulb in the creche, the entire cost of displaying and maintaining the creche has been borne by the Creche Committee. Since 1977 the creche has been unlit altogether.

The creche which since 1957 the Creche Committee has displayed at Boniface Circle consists of a wooden frame, approximately six feet high at the tallest point, and dropping off on both sides to about three and a half feet. The frame is nine feet long, three feet deep, and is covered on the inside by an oil painting. Placed inside the frame are nine hand-carved wooden figures ranging in size from six and one-half inches to three and a half feet. The creche is intended to portray the birth of Jesus Christ.

In each year from 1957 through 1983 the Creche Committee has submitted a written application to the board seeking

permission to display the creche at Boniface Circle. In 1981 and 1982, for the first time, the trustees denied permission. In 1981 the Creche Committee accepted an offer to display the creche across the street from Boniface Circle on private property belonging to the Frog Prince Proper restaurant. In 1982, the Creche Committee elected not to display the creche at all when its application for Boniface Circle was denied. The board vote to deny permission to erect the creche was 4-3 in both 1981 and 1982. The 1983 application is still pending. Also pending is an application to display a creche by the Citizens Group, a private unincorporated association of persons not representing churches. The Citizens Group first applied to display their creche in December 1982[3] after the Creche Committee's request for that year was turned down. The Group reapplied in early 1983 to display their creche the following December with the apparent intention of bringing this suit if the application was not approved. The board of trustees has taken the position that it should not act on the pending applications for 1983 while this lawsuit is under submission.

In recent times the question of whether the board should permit the displaying of the creche at Boniface Circle has been hotly contested, but it has not always been so. The original application by the Creche Committee in 1957, which expressed a desire to display the creche in order to convey "the real significance of Christmas" (Stipulation of Fact, hereafter "Stip.", 8, Ex. 3), was unanimously approved by the board as were all subsequent applications through 1972. However, as early as 1960 events began to transpire which made what had been a routine approval by the board, not routine at all. In 1960 the American Jewish Congress, prompted by members of its Scarsdale chapter, wrote the board expressing concern over the placement of a "religious display on public property." The letter stated, "We, as members of the Jewish faith, find religious display natural and acceptable on Church property,

3 To be precise, the December 1982 application was made by a group of individuals, four of whom are now plaintiff members of the Citizens Group. It appears that this application was to display the same creche that the Citizens Group now seeks to display in accord with its 1983 application.

but are distressed by them [sic] when they appear in a public place which is shared by all residents of our community." The letter asked the board to "safeguard the neighborly feeling in our community by arriving at a decision which will strengthen the American principle of separation of Church and State." (Ex. 6).

The board, as it had in the past, unanimously approved the creche application for 1960, but the next year it appointed a "Special Committee" to study and report on the issue. In 1962 the Special Committe recommended after meeting with persons of differing views, including those with legal opinions, that there be "no change" in the board's policy of allowing the creche (Ex.8).

In January of 1963 the Scarsdale Chapter of the American Jewish Congress again appealed to the board to change its policy adding that "many members of the Jewish Community believed that their feelings . . . have been disregarded . . . [in] an area involving a great deal of emotion" (Ex.9). In response, the Special Committee arranged a meeting between those with divergent views on the creche and a professor at New York University in the field of Human Relations. No recommendation resulted and the board continued its unanimous approval of the creche over the next ten years.

In 1973 unanimity of board voting ended. For the first time one of the seven Village trustees abstained on the creche issue, and the following year the same trustee again abstained. In 1975 the trustee again abstained and on this occasion, for the first time, one trustee voted to deny the creche application. At least one negative vote was cast in every succeeding year thereafter through 1979. In 1980, three trustees voted no, and in 1981 and 1982 four trustees, constituting a majority, voted to deny permission for display of the creche. A review of the statements made by trustees abstaining or voting to deny the creche application, discussed in more detail below, indicates that these trustees were concerned with violating either the letter or spirit of the constitutional prescription that there be a separation of church and state.

The voting record of the trustees after 1972 reflected a growing division both on the board and also in the community

over the creche. In 1975 the board considered the letter of (apparently) a resident who opined that the creche's placement on public property was unconstitutional. The board directed its Village Attorney to look into the matter. In 1976 another Scarsdale resident advised the Village Attorney that if the Village Attorney concluded that the display was lawful, the resident would commence litigation. Shortly thereafter, a lawsuit was brought challenging the Board's annual approval of the creche application, but the suit was dismissed for procedural reasons. *See Rubin v. Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1976).

In response to the escalating division, a group of ten members of the clergy from five Scarsdale churches wrote to the board offering their respective church properties, on an annually rotating basis, for display of the creche. With their proposal the clergymen offered the following "statement":

> The symbols of religion say different things to different people. A Creche, for example, symbolically makes a particular religious statement which is not held by all.
>
> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.
>
> This is not to say that religious symbols should not be seen in a community. Homes, media announcements and places of worship can be used by those wishing to call attention to their beliefs. In this way, the religious pluralism and freedom which we enjoy in this country are best served.
>
> Our proposal, therefore, is not to remove the Creche from public view but rather to move the Creche to a location which is not public property. (Ex. 62, pp. 3-4).

In the same year, 1976, the clergy of yet another church wrote the Village Mayor to express opposition to moving the creche to church property. This letter expressed the view that an "overwhelming majority" of the church's "more than 1000" parishioners believed that the "tradition of eighteen years" of displaying the creche at Boniface Circle should not be changed. The letter suggested that "if the creche is excluded from town property quite logically the scheduled singing of Christmas carols . . . [and the displays of] Christmas trees and wreaths [should not] be permitted on public property." (Ex. 42).

The Village board responded to the growing controversy in 1976 by asking the board-appointed Human Relations Advisory Council ("Advisory Council") to make an appraisal of community attitudes regarding the creche. From 1976 to 1978 the Advisory Council recommended that "in the interests of community relations" permission to erect the creche be granted (Stip. 29(a)). The Advisory Council was of the view that the creche's presence at Boniface Circle was "accepted by a majority in the Scarsdale community" (Ex. 44). In 1980, "[d]ue to increased and diverse comments over the approval of the creche's placement in Boniface Circle during the 1979 Christmas season" the board again asked the Council to render a report on the issue (Ex. 46). On this occasion, the Advisory Council advised the board:

> All members of the Council feel that the Creche would be placed more appropriately on non-public property. All possible avenues have been explored. Church sites are not acceptable to the Creche Committee and suitable private property locations are not available. After consultation with the Village Attorney, the Council sees no legal problem as no public time or money is involved. The Council agrees unanimously that it is less devisive [sic] to good community relations to allow this long standing tradition to be maintained rather than to deny permission. (Ex. 46).

The Advisory Council made similar findings in 1981 and 1982, but in each year "it urged the Creche Committee to seek other sites." (Stip. 29(b)).

Apparently with the hope of quelling the dispute, the board began in 1976 requiring that the Creche Committee display a sign next to the creche indicating that the display was not sponsored by the Village. From 1976 through 1980 a small unlit sign was implanted next to the creche stating, "This creche has been erected and maintained solely by the Scarsdal[e] Creche Committee, a private organization." (Ex. 29). The dimensions of the sign are approximately 10 3/4 inches by 14 1/2 inches, its decal letters measures 1/2 inch high. It appears that the sign was not readable by persons standing on the perimeter of the park or traveling past Boniface Circle in a car, although the creche could have been recognizable from such at either point. On the other hand, one observing the creche head-on and from a few feet away, the vantage point from which its sponsors no doubt intended that it be viewed, would have been able to read the sign.

When the board of trustees voted to discontinue its long history of allowing the creche in 1981, a small uproar ensued which was refueled the following year when the board again voted to prohibit the creche. Former Mayor Jean Stone, who was identified in local newspapers as having cast the "deciding vote," received several box loads of mail on the subject, as did the board. In the Mayor's view many letters—at least 100—had an antisemitic tone. An unknown number of such letters, many unsigned, may have come from outside of Scarsdale, where news of the creche denial had spread. The Mayor testified that the letters she received often assumed incorrectly that she was Jewish because she voted against the creche (Stone dep. at 60-64).

Many dozens of the letters received by the board or the Mayor, or which were printed in the local press on this issue, have been made part of the record.[4] A significant number of those opposed to the board's decision denying the creche application (*see* Ex. 63) perceived the problem as one stemming from a difference between Christians and Jews, although only

4 A description of the mail and newspaper editorials which follows is intended to be illustrative and not exhaustive.

a handful were what could be called blatantly antisemitic. A few of the opposition letters expressly stated a view that the problem was not a Christian-Jewish one. Most of the opposition letters expressed "shock" or "disappointment" with the board's decision. Some argued that as long as access for the display of religious symbols was made equally available to other religious points of view, the creche should be displayed, and some were of the view that there was a constitutional right to have the creche displayed. Others, attempting to show the extreme consequences of the board's decision, argued that consistency would require the banning of caroling and wreaths from Boniface Circle, or even the sale of Christmas cards downtown. Some argued for a boycott of merchants in the downtown area, a plan which Mayor Stone believed was at least partly inspired by anti-Jewish sentiment. A few letters support the Mayor's conclusion. A number of opposition letters suggested that the board's decision constituted an attack on religion at a time when a national return to religion was needed. Many letters were in the form of petitions. One such letter/petition, subscribed to by about eighty or so signatories, stated, "Unless we are mistaken the United States is regarded by the world as a christian [sic] country, and the creche is simply a symbol of our christianity." Many letters deplored the ending of what they described as a "Village" or "Scarsdale Tradition." The letters at times refer to the creche as the "Scarsdale Creche."

A fewer number of letters, but still a great many, were received praising the board's decision (*see* Ex. 62). Quite a few called the decision "courageous," and most generally expressed "thanks." The commonly cited reason for supporting the board's decision was that it was improper to have religous symbols on public property, typically because the park belongs "to all the people in the Village." Some saw the display as primarily aimed at "teach[ing] the rest of us that Scarsdale is still a Christian community." Others thought is was wrong for the "government to facilitate wholly religous exhibits," and suggested that in the public mind "Boniface Circle in the center of the village, represents and is identified with Scarsdale and

the people of Scarsdale." One letter, published in a local newspaper, espoused the view that "the potent impact the message conveyed . . . [from] public premises upon which the religous symbol rests could not be purchased for money." A significant number of letters in support of the board's decision came from persons who identified themselves as Christians. One of these letters expressed the view, a view shared by the Mayor, that many non-Christians had over the years been reluctant to express their felt opposition to the creche. Another likened the request to have Boniface Circle bear a religious display to a request to have the "government . . . say [a person's] prayers for him," and a third saw the request as an "attempt to use [the] government to express [a] religious point of view."

Local newspapers (*see* Ex. 66) were generally supportive of the board's recent decisions, both pro and con, on the issue of whether to allow the creche. An editorial in early 1980 stated, "the questionability of the Village even seeming to be promoting religion is particularly great here where so much of the population does not belong to the religion which the display . . . can be considered to be promoting." Nevertheless, the paper supported the board's recent decision to allow the creche because "[a]fter more than 20 years, it would be clearly more offensive suddenly to bar it than to permit it again." When the board voted to deny the creche application in 1981, an editorial stated:

> The creche committee, had it heeded village appeals to find another location, could have averted this year's divisiveness. In the wake of the village's decision, the committee's current stance to keep the creche "boxed up" this year not only appears petulant, but it must cast doubt on the committee's true motives.
>
> Community good will would be better served if the creche committee would accept, with grace, the village board's decision and place the creche at an appropriate location. This could be the healing step to avert divisiveness in future years.

As the editorial suggests, the issues of whether 1) the Creche Committee or, for that matter the citizens Group, has available to it private property on which to place the creche, and 2) the creche proponents have actively sought to locate such property, have been issues of concern to the community and the board of trustees. Former Mayor Stone, for example, who in 1979 voted to allow the creche at Boniface Circle, took into consideration what she believed was the Creche Committee's unwillingness to seek out an alternative private site for the creche in later voting to deny access. When asked why the Creche Committee turned down the idea of rotating the creche among church properties, Patricia Curran, who is the chairperson of the Creche Committee, gave several reasons. The first was that "it would destroy the ecumenical aspect of the Creche Committee." The other reasons were that some of the properties were not centrally located, some had topographical problems, and some already had creches (Curran dep. at 55). Offers to make either the Scarsdale Congregational or the Cummunity Baptist Church a permanent home for the creche display, extended after the board denied access to Boniface Circle, were rejected for "topographical" and "landscaping" reasons. *Id.* at 17-18. While the other stated reasons may contain some merit, the first reason, a desire that the creche speak an "ecumenical" message, and the perception that this goal would best be achieved if the creche spoke from public land, appears to have been preeminent. The record indicates that the Creche Committee did not initiate, and in some instances did not even follow up leads which could have produced a suitable private site. Further, the Congregational and Baptist Churches appear to be accessible and central to residents, and the topographical problem of the former church, sloping grounds, seems surmountable. Lastly, the Creche Committee declined to display the creche at the Fr[illegible] Prince Proper Restaurant in 1982, located across the street from Boniface Circle, and accepted an offer to do so in 1981 only reluctantly. *See Id.* at 12-15. We note, in contrast, that the Creche Committee seems to have been fully willing to displaying the creche from two other public sites which were discussed. *See Id.* at 8-10. In short, it

appears that a dominant reason why the Creche Committee has wanted the creche at Boniface Circle is because Boniface Circle is *public* land. The position of the Citizens Group on this issue is simply that it has the right to place its creche on public property and therefore is not willing, pending the outcome of this lawsuit, to settle for a private site. *See* Butler dep. at 48; McCreary dep. at 84-85.

The applications by the Creche Committee and the Citizens Group which have been denied or are pending vary in terms of the time period sought to display the creche. Prior to 1980 applications by the Creche Committee requested only that the display be permitted during "the Christmas season." As noted, it appears that displays were permitted for about two weeks. In 1980 and 1981 the Creche Committee requested that the creche be allowed from December 17 to be removed "as soon as possible after the New Year." (Stip. 9(b)). The request in 1982 by the Creche Committee was the same except that the requested beginning date was December 16. The pending application by the Creche Committee for 1983 is "for the 1983 Christmas Season." Put into historical context, we construe this request to be for a period of about two weeks.

The Citizens Group application for 1982, which was denied, sought to display the creche from December 18 to December 26, or about nine days. The Citizens Group's pending request for 1983 is exactly the same except that the proposed starting date is December 17, and so is for about ten days. Although it appears that such details were never communicated to the board, the Citizens Group's heretofore never displayed creche is significantly smaller than the Creche Committee's (the figures in the nativity scene are only twelve inches high, although there are more of them, and the total area of the scene occupies only three feet across), and the Citizens Group would propose to display a larger sign indicating the Village's lack of endorsement of the creche than has the Creche Committee. McCreary dep. at 28-81, 40-41.

As a final matter, we note that creches are currently displayed during the Christmas season outside of homes and churches in Scarsdale, and that there is no indication that

either members of the community or the Village have ever expressed opposition to such displays.

II DISCUSSION

At the outset we address plaintiffs' free exercise claims. Only the Citizens Group has pressed these claims, and we find that they both do not describe the crux of the alleged wrong and otherwise are without merit. "To demonstrate an infringement of . . . free exercise rights, an individual must show 'the coercive effect of the [state] enactment as it operates against him in the *practice* of his religion.' " *Brandon v. Board of Education*, 635 F.2d 971, 976 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (quoting *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963)) (emphasis added). To evaluate the coercive effect on the practice of religion, the court should "inquire into the relative importance of a particular religious ritual and the degree to which exercise of that practice is infringed by government action." *Id.* Governmental acts or policies forcing individuals "to choose [for example] between neglecting their religious obligations and rendering themselves liable for criminal sanctions or ineligible for state benefits" are particularly deplored. *Id.* at 977. In finding that plaintiffs' free exercise claims are insubstantial, we are persuaded by the following. First, plaintiffs have admitted that displaying a creche is not mandated by their religious beliefs. Butler dep. at 62; Curran dep. at 41. Second, plaintiffs have not on this record shown that displaying a creche on *public* property has *any* significance to their following the dictates of their religion. Third, the record is clear that plaintiffs may display creches on private property in Scarsdale. Fourth, and in sum, there is no evidence in this case that plaintiffs are being penalized for acting in accordance with their religious beliefs, thus forcing them to choose between so acting, and incurring the penalty, or not acting and avoiding it. *See generally Brandon v. Board of Education*, *supra*, at 977-78.

What we do find solidly implicated in this case is the question of whether plaintiffs have been impermissibly denied

access to Boniface Circle in order to exercise their right, guaranteed by the Free Speech Clause of the First Amendment, to *express* their religious views.

In assessing whether a free speech right of access to public property has been impermissibly denied,[5] the court must make an initial determination as to the nature of the property involved. This is because, as the Supreme Court recently explained, "The existence of a right of access to public property [to engage in speech] and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Association v. Perry Local Educators' Association*, 103 S. Ct. 948, 954 (1983). In *Perry* the Court identified three "categories" of public property relevant to the inquiry of whether a denial of access is valid, and also articulated the corresponding standards for evaluating such denials. The first category of public property consists of "places which by long tradition or by government fiat have been devoted to assembly and debate." *Id.*

> At one end of the spectrum are streets and parks which 'have immemorially been held in trust for use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'

Id. at 954-55 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939). With regard to these "quintessential public forums . . . the state [may] enforce a content-based exclusion [only if] it . . . show[s] that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 955. "The state may also enforce regulations of the

5 The First Amendment, applicable to the states through the Fourteenth, provides "Congress shall make no law . . . abridging the freedom of speech." Defendants have conceded "that a symbol for First Amendment purposes is a form of 'speech' " tr. at 49, and in fact they stress that a symbol is a "shortcut from mind to mind." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943). Thus, there is no dispute here that an application to "speak" from public property was denied.

time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications." *Id.*

The second category of property relevant to assessing denials of access for speech purposes comprehends those places "which the state has opened for use by the public as a place for expressive activity." *Id.* "Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* This type of public forum "may be created for a limited purpose such as use by certain groups, *e.g., Widmar v. Vincent*, 454 U.S. 263 (1981) (student groups), or for the discussion of certain subjects, *e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976)(school board business)." *Id.* at 955 n.7.

The final type of public property relevant to free speech access analysis consists of "property which is not by tradition or designation a forum for public communication." *Id.* at 955. Such property might include the land on which a jail sits, *Adderley v. Florida*, 385 U.S. 39 (1966), a military base, *Greer v. Spock*, 424 U.S. 828 (1976), or, as in the *Perry* case itself, internal school mailboxes. With respect to this category of property "the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry, supra*, at 955.

Apparently with this analytical framework in mind, defendants raise by way of their first proposed defense what we consider to be the threshold issues in this case. Defendants take the position that their denial of plaintiffs' applications to display a creche did not violate plaintiffs' free speech rights because "Boniface Circle is not a public forum; it is a small piece of land reserved by the Village for solemn commemorative occasions connected with the war memorial. The creche display, moreover, is inconsistent with the dedicated purpose of

Boniface Circle." Def. Pre-trial Mem. at 25. The defendants elsewhere characterize Boniface Circle as a place exclusively for "patriotic reflection." *Id.* at 39.

Turning to the facts before us, we are unable to agree with defendants' characterizations of the property in issue and instead conclude that, like most "parks."[6] Boniface Circle is a traditional public forum falling into the first category of public property identified in *Perry.* We reach this conclusion principally because 1) the Village has never shown an inclination to legally establish or even describe Boniface Circle as anything other than a park of the kind that is traditionally dedicated to First Amendment activities, and 2) the Village's pattern of granting and denying access to Boniface Circle belies the conclusion that it is either a limited public forum or no public forum at all. With regard to the first point, Boniface Circle was deeded to the Village in 1931 "for PARK PURPOSES ONLY." (Ex. 1) (uppercase in original). No qualifications as to the type of park Boniface Circle was to be were set forth in the granting instrument and, indeed, the instrument provided that the land was to revert should it ever cease to be used "as a park or open space." *Id.* When the Village determined to create the war memorial in 1947, there was no expressed intention to transform *Boniface Circle* into a war memorial. Rather, the war memorial was to be "located *in the park* at Boniface Circle." (Ex. 70) (Emphasis added). The trustees' resolution establishing the memorial instructed that it was only to occupy "such part of the public land in Boniface Circle as is necessary for the accommodation . . . of a monument" (Ex. 73), and it is admitted that the memorial which was approved occupies only one-sixth of the public land. The Village has not subsequently attempted by way of some official act or proclamation to transform the nonoccupied part of Boniface Circle into a war memorial, and "[t]raditional public forum property will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use

6 Parks are generally "considered, without more, to be 'public forums.' " *United States v. Grace*, 103 S. Ct. 1702, 1706-07 (1983).

other than as a forum for public expression." *United States v. Grace*, 103 S. Ct. 1702, 1709 (1983).

With regard to the second point, we note the following. First, while it is true that over the years most applications for access to Boniface Circle have been denied[7] and applicants have been referred to other public parks, it appears that only once in the span of decades since the memorial was built was the stated reason that Boniface Circle was dedicated to war memorialization. On that occasion the Village Manager stated that "Boniface Circle is a War Memorial and is *mainly* used for memorial occasions and services" (denial of access for high school literary magazine fundraiser) (Stip. 92, Ex. 100) (emphasis added). On the other occasions when access was denied, the stated reasons were "because of shopping, parking, traffic, etc." (denial of access for American Field Service carnival) (Stip. 79, Ex. 86), and because an alternative site "might be a safer place" for the proposed activity (alternative site approved for Girl Scout baked goods sale) (Stip. 81, Ex. 89). On all other occasions when access was denied, no reason for the denial was given.[8] Thus, while it does appear that the Village has been reluctant to allow speech and assembly on Boniface Circle, the denials of access just as easily support the conclu-

7 It is also true that there have been few applications for First Amendment access to Boniface Circle, probably because the park is\small and would not easily accommodate uses to which other Scarsdale parks have been put.

8 Defendants point out that one applicant, the American Red Cross, sought permission to erect a four foot by four foot red wooden cross at Boniface Circle and was turned down because "it would set a precedent and requests from similar organizations could not reasonably be denied" (Stip. 73, Ex. 84). This does not, of course, tell us *why* the Village was reluctant to set a precedent and since the Red Cross denial came at a time (1958) when display of the creche was already being permitted, it is not obvious that the Village's concern was to reserve Boniface Circle for patriotic activities. Indeed, an argument can be made that a Red Cross symbol, unlike a creche, is consistent with the theme of patriotism. In any event, it seems just as likely that the Village had for example, an aesthetic concen in mind and was improperly hoping to avoid the problem of having to develop valid time, place or manner restrictions to regulate future uses.

sion that the reason for this reluctance was unrelated to the war memorial as they do that it was related. *See also* Tooley dep. at 186 (lending support to this conclusion).

The approvals of access demonstrate that Boniface Circle's status as a forum only for patriotic or solemn commemorative occasions was at best a sometimes thing. In addition to the Fourth of July and Memorial Day celebrations,[9] the Village has permitted access to Boniface Circle "for a carnival in connection with the American Field Service Work Day" (Stip. 78, Ex. 87), and as the site for launching the "Community Fund Drive" (Stip. 87, Ex. 95). On the latter occasion, the Community Fund was permitted "to station a facsimile of a rocketship in the vicinity of the flag pole on Boniface Circle and to release a helium filled balloon from the nose of said rocketship." *Id.* Boniface Circle has also for many years been the site of Christmas celebrations. The Town Club has been allowed to sponsor its Christmas Carol Sing at Boniface Circle on numerous occasions with an official of the Village welcoming the carolers in his or her official capacity (Stip. 58, 60). On a number of occasions the Village provided an amplification system or platforms for the carolers' use (Stip. 58), and the 1982 Christmas observances like some earlier years featured the arrival of Santa Claus on a Village-owned fire truck (Stip. 60). Every year, apparently going a long way back, the Chamber of Commerce has been "permitted access to and use of Boniface Circle for the purpose of installing and displaying Christmas ornaments" (Stip. 57). And, of course, for twenty-four years, the Village authorized the placement of a creche at Boniface Circle. While defendants argue that the creche "is inconsistent with the dedicated purpose of Boniface Circle," they make no attempt to explain why the other authorized uses are consistent. In any case, we see no reason to conclude that the singing of "Frosty the Snowman," "O Little Town of Bethlehem," or "Hanukah" (Stip. 60, Ex. 80), the erection of

9 The record discloses that, with the exception of 1961, Fourth of July celebrations in the Village have occurred outside of Boniface Circle (Stip. 65, 70). Memorial Day celebrations have typically begun at Boniface Circle, where a wreath has been placed at the war memorial and a prayer said by a member of the clergy, who varies from year to year. A parade outside of Boniface Circle then has followed (Stip. 64).

platforms and an amplification system, or several of the other permitted uses of Boniface Circle are any more consistent with solemn, patriotic reflection or war memorialization than is a mute, barely illuminated nativity scene. Most importantly, over the twenty-six years that the propriety of placing a creche at Boniface Circle was discussed, or on any of the occasions when other uses of Boniface Circle were allowed, there is no evidence that the Village Board of Trustees ever considered whether the proposed use would be inconsistent with what defendants assert is the "dedicated purpose of Boniface Circle."[10] In sum, on the record before us, we are unable to conclude that the Village of Scarsdale "consciously has limited access," *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), in a way which would warrant a finding that Boniface Circle is either a limited public forum or not a public forum at all. To the extent that it has allowed at least some access to what is by all description and appearance the kind of public property traditionally viewed as being "immemorially . . . held . . . for purposes of assembly" and speech, *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939), we find that Boniface Circle is a public forum. To the extent that the Village has *expressed* little concern for protecting Boniface Circle's alleged purpose, and otherwise has *acted* inconsistently toward it, *c.f. Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (manner restriction should not be credited as legitimate where officials act inconsistently toward it), we conclude that the forum is not "limited" within the meaning of *Perry* and the cases it cites. It may well be that a village can dedicate property solely for the pronouncement of patriotic views. *See.* L. Tribe, *American Constitutional Law* § 12-4 at 590. We hold only that this village has failed to do so in any legally cognizable way.[11]

10 In twenty-five years of board discussions, the only reference we have found which seems to take note of the war memorial while offering an opinon on the propriety of allowing the creche is a one sentence, apparently spontaneous remark by Trustee Gordon in 1976. The trustee stated in support of allowing the creche that he did not think Boniface Circle with its war memorial was an "entirely improper" location (Ex. 22).

11 An argument that Boniface Circle was closed as a public forum, or became a limited public forum, simultaneous to the board's decision to bar

Since plaintiffs were denied access to a traditional public forum, we must now evaluate the denial to determine whether it stemmed from a content-neutral time, place or manner restriction, or was content-based. We conclude the denial was content-based for two reasons. First, and most important, debate by Village trustees and other officials as to whether a creche should be allowed at Boniface Circle has historically always focused on the religious message the creche was thought to express. Thus, the perennial concern expressed was always that a *religous* symbol would be placed on "pubiic" or "village" property. Whether the juxtaposition of religious symbolism and public land was thought to violate the Establishment Clause or was merely thought to generate discord in the community, the concern was always the religiosity of the symbol and not, for example, whether the creche, as a three dimensional structure, would disrupt pedestrian traffic, or, as defendants imply, would detract from the "calm, tranquility, and . . . reverence," *Washington Free Community, Inc. v. Wilson*, 334 F. Supp. 77, 82 (D.D.C. 1971), *aff'd*, 484 F.2d 1078 (D.C. Cir. 1973), the Village purportedly seeks to maintain at Boniface Circle. (*See* Ex. 8, 9, 19-28). For this reason we think the fact that plaintiffs' applied for access only to Boniface Circle and not to some other park defendants suggest might have been more appropriate, is of no significance. The record makes clear that the historical concern, and by 1981 the reason for denying access, derived from a feeling that because the symbol was religious it should not be on *any* public land.

The second reason for finding that the denial was content-based is that all other applicants who, like plaintiffs, applied only for access to Boniface Circle were referred to other Village-owned property when their applications to Boniface Circle were denied *(see* Stip. 81, 87, 92 and Ex. 89, 95, 100). Relatedly, the Village has freely granted access to other parks for the erection of symbols and other three dimensional objects

the creche in 1981 would not be credible for two reasons. First, the Village continued to permit caroling and other Christmas activities in Boniface Circle in 1981 and 1982. Second, there is no evidence in the record that the Village board intended to do this.

(*see, e.g.*, Stip. 73, 74, 75, 86, 87 and Ex. 84, 85, 94), and the Village had reason to know that plaintiffs might have been willing to accept other public property for erection of their creche.[12] While these facts are revealing, we think they simply underscore what an examination of the debate on the creche issue by Village officials independently makes certain: the denial was content-based. We note finally that the denial could not be upheld as a time, place or manner restriction even if it were content-neutral because it was not issued pursuant to narrowly tailored regulations.[13] *See Neimotko v. Maryland*, 340 U.S. 268 (1951).

Our final inquiry, then, is whether the content-based denial of access to public land was "necessary to serve a compelling state interest." *Perry Education Association, supra*, at 955. Defendants argue the denial was necessary to serve a compelling state interest because to allow the erection of the creche on

12 One of the options the Village considered in dealing with the creche problem was to designate part of "Chase Park" (convenient to Boniface Circle) as "Heritage Plaza." The Heritage Plaza concept was to create a forum for religious, patriotic, ethnic and other social activities by transferring Village-owned land to a private entity. The Creche Committee stated it was in favor of the proposal and, in particular, approved "of displaying the creche at Chase Park because it is centrally located and accessible to pedestrians." (Stip. 34.) Thus, the Village was on notice that, even without creating a Heritage Plaza, the Creche Committee might have been willing to display the Creche at Chase Park. The Village also had reason to know that "Depot Plaza" would have been an acceptable alternative site. *See* Curran dep. at 8-10.

13 This not to say that content-neutral time, place or manner restrictions might not have been developed which could have justified the denial. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable' "). Assuming the Village could develop valid time, place and manner regulations, having the effect of barring the erection of symbols in Scarsdale's parks, it is clear, of course, that such restrictions could not be tailored to bar only the erection of religious symbols. Content-neutrality would require that the Community Fund Rocketship, the Red Cross cross and likely any other three-dimensional object would also be prohibited.

public property would violate the Establishment Clause of the First Amendment, applicable to the states through the Fourteenth Amendment, which dictates in general terms that there be no "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 668 (1970). Because we find that allowance of the creche would contravene the Establishment Clause, we agree with defendants that the denial was proper and necessary.

We have no difficulty in finding that the creche is, in essence, a religious symbol. It depicts the birth of Jesus Christ, an event which had obvious and profound religious importance to adherents of Christian faiths. Plaintiffs, while asserting that the creche also imparts secular messages such as peace and goodwill, do not contend otherwise. The Creche Committee's complaint concedes the creche is a "religious symbol," Creche Comm. Complaint ¶ 18, and the Citizens Group's complaint admits that "the purpose of the display . . . was to celebrate and express religious convictions." Citizens Group Complaint ¶ 16. Indeed, the latter complaint suggests that a goal of displaying the creche at Boniface Circle was to give a more decidedly religious cast to the Village's celebration of Christmas. The relevant portion states:

> The plaintiffs also represent . . . that among the purposes of the display of the Creche are their desires to join in the Village's celebration of "Christmas" by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions.

Id at ¶ 18. *See also* Ex. 3 (original application to put creche at Boniface Circle because creche symbolizes "the real significance of Christmas Time".)

Conceding the religiousness of the creche, plaintiffs argue that the Establishment Clause is not implicated in this case because the Village's mere allowance of access to a public forum for the dissemination of religious views does not constitute sponsorship or support of religious activity.[14] We find that the resolution of this issue depends on whether *Widmar v. Vincent*, 454 U.S. 263 (1982) is directly controlling.

In *Widmar*, the University of Missouri had encouraged student groups to use its facilities to conduct meetings. In so doing, the Court found, the university had created a limited public forum and could not, without "a compelling state interest," bar groups from using its facilities because of the content of speakers' views. *Id.* at 270. Like defendants here, the university argued that its exclusion of religious groups did serve a compelling state interest because to allow them access would violate the Establishment Clause. The Court agreed that avoiding an Establishment Clause violation would constitute a compelling state interest, *id.* at 271, but applying the familiar three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) for determining Establishment Clause infractions[15] the Court found that the Establishment Clause did not justify the exclusion. First, the Court held, allowing access to a public forum in a nondiscriminatory way would constitute a "secular purpose," thus satisfying the first prong of *Lemon*. *Id.* at 271-72 & n.10. Second, the Court found no "entanglement" with religion since "the University would risk greater 'entanglement' by attempting to enforce its exclusion" insofar as it would have "to determine which words and activities" fell within the proscribed classification of speech. *Id.* at 272 n.11. Finally, the Court concluded, by opening its forum "to all

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14 Plaintiffs make no argument, for example, that the creche is permissible because it is part of a larger celebration which is secular in nature, *cf. Donnelly v. Lynch*, 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 1766 (1983), or because Christmas may be celebrated with state support even in religious ways. *Cf. Donnelly v. Lynch*, 691 F.2d 1029, 1037-39 (1st Cir. 1982) (Campbell, J., dissenting), *cert. granted*, 103 S. Ct. 1766 (1982).

15 Under *Lemon*, a governmental policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.' "

forms of discourse," the University would not be "advancing" religion. *Id.* at 273. With respect to the advancement of religion, the Court found "that any religious benefits of an open forum would be 'incidental,' " and it noted two factors which it deemed particularly persuasive. *Id.* at 274. The first was that an open forum for discourse did "not confer any imprimatur of State approval on religious sects or practices." *Id.* The second was that because "a broad class of nonreligious as well as religious speakers" numbering "over 100" were represented among the student groups, the open forum policy had an equally broad and secular effect. *Id.* The Court summed up by observing that "[i]f the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.' " *Id.* at 274-75 (citations omitted).

In assessing the proper precedential weight *Widmar* should be read to have in the instant case we are mindful that

> There are always risks in treating criteria discussed by the Court from time to time as "test" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.

Tilton v. Richardson, 403 U.S. 672, 678 (1971). Accordingly, it has been noted that the delicate task of construing Free Exercise and Establishment Clause law requires close attention to the "sensitive issues of fact, and . . . to the particular circumstances" involved. *Brandon v. Board of Education*, 635 F.2d 971, 973 (2d Cir. 1980), *cert. denied*, 454 U.S. 1183 (1981). *Widmar* itself cautioned that its holding derived from a particular factual "context," *Widmar v. Vincent*, 454 U.S. at 273, and was limited "to the case before us." *Id.* at 276. The *Widmar* opinion concludes by observing, "The basis for our decision is narrow." *Id.* at 277. Our job then, is to make careful observations as to the similarities and differences between the facts of *Widmar* and those before us.

In holding that the Establishment Clause would not be violated on the facts before it, the *Widmar* Court addressed a factual situation in which 1) religious speech was to take place at "group[] meeting[s]" and consist of "discourse" by "speakers," *id.* at 273, 274 & n.14, and 2) the forum in which the speech would occur would be university facilities, presumably classrooms and meeting rooms, so that the community within which the forum existed was comprised of "young adults . . . able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14. In contrast, the instant case involves 1) religious speech in the form of a physical structure which for ten to fourteen days is to convey its adherents' message, twenty-four hours a day, even in their absence, and 2) is to do so in a public park visited by persons "of all stripes," clearly including children.[16] With these factual differences in mind, we conclude that *Widmar* is controlling on the "purpose" prong of the *Lemon* test, is somewhat controlling on the "entanglement" prong, and is not controlling on the "primary effect of advancement" prong.

Widmar makes clear that in a case in which access to a public forum is sought for the purpose of engaging in religious speech, the purpose which should be attributed to the state in allowing the speech is the secular one of providing equal access to the public forum. *Widmar v. Vincent*, 454 U.S. at 272-73 & n.10. Accordingly we find that allowing the creche would not violate the Establishment Clause for want of a secular purpose.

The entanglement issues are more complex than in *Widmar*, but they do not tilt so clearly in one direction that allowance of

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16 Although there is little direct testimony on this point, the record makes plain that children have viewed the creche at Boniface Circle. First Boniface Circle's proximity to the business district filled with stores and professional offices, makes plain children would have opportunities to view the creche. A number of letters regarding the creche were written by people who said they grew up viewing it as a Village "tradition" *(see, e.g.*, Ex. 82), and some letters expressing a view, were written by children themselves, or by "families." One letter printed in the *Scarsdale Inquirer* in 1976 stated, "Although I'm only 13 I feel the creche, a deeply religious symbol does not promote 'good will.' I am Jewish: my menorah lights will burn in my home. I like to think Boniface Circle belongs to all Scarsdalians." (Ex. 62).

the creche could be found to violate the Establishment Clause on this ground alone. What was said in *Widmar,* that enforcing the exclusion would involve some entanglement in the sphere of religion, is equally true here. In order for the Village to bar religious symbols from public property, the Village would have to determine which symbols were "religious." On the other hand, insofar as governments already must make such determinations to keep religious signs and symbols off public buildings, *see, e.g., Stone v. Graham,* 449 U.S. 39 (1980) (per curiam); *Goldstein v. Fire Department of Suffern,* 559 F. Supp. 1389 (S.D.N.Y. 1983); *Fox v. City of Los Angeles,* 587 P.2d 663 (Cal. Sup. Ct. 1978), to avoid spending money on their creation or display, *see, e.g., Gilfillan v. City of Philadelphia,* 637 F.2d 924 (3d Cir. 1980), *cert. denied,* 451 U.S. 987 (1981); *Donnelly v. Lynch,* 525 F. Supp. 1150 (D.R.I. 1981), *aff'd.,* 691 F.2d 1029 (1st Cir. 1982), *cert. granted,* 103 S. Ct. 1766 (1983), and to avoid their permanent placement on public land, *see, e.g., ACLU v. Rabun County Chamber of Commerce,* 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd,* 678 F.2d 1379 (11th Cir. 1982), *op. modified,* 698 F.2d 1098 (11th Cir. 1983); *Lowe v. City of Eugene,* 451 P.2d 117 (Or. Sup. Ct.), *op. withdrawn,* 459 P.2d 222, *rehearing denied,* 463 P.2d 360 (1969), *vacated,* 558 P.2d 338 (1976), *cert. denied,* 397 U.S. 1042 (1970), having to make such determinations with regard to shorter term displays in public forums does not seem to add much to their burden.

If a free speech right to display religious symbols in public parks were judicially recognized—a fact not assumed in the Village of Scarsdale—and applications to display religious symbols thereby increased, we think the type of entanglement associated with fairly making available scarce time and space could be a problem. Neutral time, place and manner regulations would help, but the situation would appear ripe for "lurking doubts about favoritism." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 304 (1974).

The record does indicate the existence of a "divisive political potential" over the creche issue, another aspect of entanglement. *Lemon v. Kurtzman,* 403 U.S. 602, 622 (1971). Clearly

the issue has created division in the community, and it is also true that some candidates for the board have run, with little success, taking stands on the creche. However, a result in this lawsuit, one way or the other, would seemingly leave little to future political debate, and accordingly we do not see the divisiveness element as contributing much to entanglement. In sum, while allowing the creche does generate some entangelement potential, this potential is not enough, in our opinion, to constitute an Establishment Clause violation.

It is with respect to the "primary effect of advancing religion" prong of *Lemon* that the instant case differs most from *Widmar.* As noted, *Widmar* found no improper advancement of religion when the role of state authority was limited to making its property available in a nondiscriminatory way so that students could gather to exchange and express religious ideas. Other cases similarly support the conclusion that where assembly and religious expression are contemporaneous, merely allowing speakers to speak from public property does not have the primary effect of advancing religion. *See, e.g., Fowler v. Rhode Island,* 345 U.S. 67 (1953); *Brandon v. Board of Education,* 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981); *O'Hair v. Andrus,* 613 F.2d 931, 934-35 (D.C. Cir. 1979). Thus, if plaintiffs had sought to hold a religious rally, conduct a sermon, leaflet, or otherwise personally engage in expressive conduct, we would have little doubt that the proposed activity would, under the protection of the Free Speech Clause, run free and clear of the Establishment Clause.

But this conclusion does not lead inexorably to the additional conclusion that *all* forms of religious expression will be entitled to the same protection or will be held just as permissible as comparable secular forms of speech might be.[17] Al-

17 We have little doubt, for example, that the Village could permit the Community Fund rocketship to sit on Boniface Circle forever, if the Village so wished. On the other hand, we would almost certainly have to reach a different conclusion if it wanted to permit a permanent altar of some kind. *Cf. Tilton v. Richardson,* 403 U.S. 672 (1971) (conversion of property paid for by government for secular purposes permissible, but conversion for

though we are aware of no cases which squarely address this issue, we think it a sound proposition that, as is true with any other religious activity, to the extent religious speech sufficiently relies to effect its purpose on the "prestige, power and influence of [the state]," *Abington School District v. Schempp,* 374 U.S. 203, 307 (1963) (Goldberg, J., concurring), it will implicate the state in the advancement of religion in violation of the Establishment Clause. Accordingly, we must decide if the manner chosen by the plaintiffs to convey their religious message sufficiently relies on the "prestige, power and influence" of the Village to constitute an impermissible state advancement of religion.

To decide this question, we consider that the "primary effect of advancing religion" prong of Establishment Clause analysis is concerned with state action which has "the direct and immediate effect of advancing religion," *Committee for Public Education v. Nyquist,* 413 U.S. 756, 783-84 n.39 (1973), and is likewise unconcerned with effects which provide only " 'indirect,' 'remote,' or 'incidental' benefit." *Id.* at 771. *See Widmar v. Vincent,* 454 U.S. at 273. On the other hand, government need spend no money to advance religion in violation of the Establishment Clause. *See Stone v. Graham,* 449 U.S. 39 (1980) (per curiam). The "cases recognize that government sponsorship of religious beliefs can occur in ways far more subtle than endowing state churches or mandating acceptance of certain religious rites or tenets." *Donnelly v. Lynch,* 525 F. Supp. 1150, 1175 (D.R.I. 1981), *aff'd,* 691 F.2d 1029 (1st Cir. 1982), *cert. granted,* 103 S. Ct. 1766 (1983). Indeed, "the mere *appearance* of a joint exercise of . . . authority by Church and State provides a significant symbolic benefit to religion" and therefore may impermissibly advance religion. *Larkin v. Grendel's Den, Inc.,* 103 S. Ct. 505, 511 (1982) (emphasis added). *See also Stone v. Graham,* 449 U.S. 39, 42 (1980) (per curiam); *Brandon v. Board of Education,* 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123

religous purposes violates Establishment Clause). *See also, ACLU v. Rabun County Chamber of Commerce,* 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd,* 678 F.2d 1379 (11th Cir. 1982).

(1981). Thus, the State must make sure that its "efforts to perform a secular task . . . [do] not lead it into such an intimate relationship with religious authority that it appears . . . to be sponsoring that authority." *Roemer v. Maryland Public Works Board,* 426 U.S. 736, 747-48 (1976).

Guided by these principles, we find that allowing plaintiffs' creche to stand for ten or so days at Boniface Circle would have the direct and immediate effect of advancing religion in two related ways. First, in contrast to cases like *Widmar* where speech derives from the simultaneous efforts and actions of those who have gathered to engage in it, when a symbol is placed on public land the land performs an added and enhanced *function.* No longer is the land just a place from which a message can be proclaimed; when a symbol is left on public land the land actually becomes the message bearer. This means that public resources are substituted for personal conduct as a way of generating the speech. Thus, for example, even if the persons on whose behalf the symbol speaks its religious message were to eschew the cold of Scarsdale and choose instead to winter down south, the message would still be proclaimed because public property would be there to carry that message.[18] Ours is not a case, therefore, where "government . . . lets each [religious group] flourish according to the zeal of its adherents," *Zorach v. Clauson,* 343 U.S. 306, 313 (1952); when public property becomes the message bearer, government allows religion to flourish in a way which bears no necessary relation to the zeal of its adherents. Thus, state resources are relied upon and used to advance religion in a way

18 We need not assume the most egregious case to perceive the validity of the point. Undoubtedly, during a continuous ten day period there would be many occasions on which the persons on whose behalf a religious symbol speaks would be at home, at work or otherwise occupied. The message, of course, would be proclaimed nevertheless. This reality is particularly laid bare by the concession of one of the individual plaintiffs that during his six or seven years as a resident of Scarsdale, he never once made a trip downtown just to see the Village creche, and that he only noticed its presence in two or three of those years; this despite his "strong" and "deep" conviction that a creche be displayed at Boniface Circle. Butler dep. at 22-29, 90.

which "cannot realistically be termed simply accommodation." *Abington School District v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring).

The second way in which permitting the creche for ten days would advance religion is closely related. Because when a symbol is implanted on public land that land uniquely becomes the message bearer, and because, concomitantly, there are no persons present to whom the receiver of the religious message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present.

The record discloses in two ways that the appearance of state support, brought about when symbols are erected and left on public property, is an actual and not merely a theoretical problem. The first relates to the fact that other forms of religious expression, although occurring on public property, have not, in stark contrast to the creche display, generated much if any complaint. The Village, for example, has routinely and for many years allowed local churches to hold picnics in its parks and block parties in its streets (Stip. 72). It has permitted Wayside Cottage, a publicly owned historical building, to be used for religious services and celebrations (Stip. 67). It has allowed its streets and parks to be used to publicize and raise money for religiously sponsored and affiliated philanthropies (Stip. 85, 96-97). And it has allowed members of the clergy to say prayers and give benedictions on public property at Memorial Day gatherings and at the annual Christmas Carol Sing (Stip. 64, 79). Unlike the creche, none of these uses has generated letters protesting that the Village's streets and parks belong to "all of the people," nor forced the board to ponder the question of whether its decision to allow the use would *in fact* be supporting religion. The record suggests that, in contrast to public gathering uses, people have objected to the creche precisely because an aura of Village approval has adhered to it.[19] Removing this aura of Village approval was the

19 People have *defended* it for exactly the same reason, arguing that the creche should be allowed to remain because it is a "Village" or "Scarsdale" tradition.

primary concern of the members of Scarsdale's clergy who offered their church properties on an annually rotating basis for display of the creche.

Indeed, cultivating an aura of Village approval is, in our view, one of the factors fueling plaintiffs' desire to have the creche on public property. This is the second way in which the record suggests that the appearance issue is more concrete than theoretical. The Creche Committee has conceded, through its chairperson, that among its reasons for wishing to display the creche at Boniface Circle is a desire to enhance the creche's merely religious message with an "ecumenical aspect." *See* Curran dep. at 54-56. We have already noted that, on the record before us, this reason appears to be a dominant one. Imbuing the creche with an ecumenical appearance or the appearance that the symbol speaks a "worldwide, general, or universal" message, *Webster's Third New International Dictionary* (unabridged ed. 1971), would seem to occur *only* if Village land—the property of "all the people"—is in fact linked in the receiver's mind with the message, since there is nothing inherently ecumenical about the creche standing alone. The likelihood of a mental linkage between the message and the property owner's identity is the stated reason why the Creche Committee believes that the "ecumenical aspect" of the creche's message would be destroyed if the creche were displayed on church property. Curran dep. at 54-56. However unsatisfactory the alternatives may be,[20] the problem with attempting to create an "ecumenical aspect" by placing the creche on public property is that the creche does *not* speak for all the people. More fundamentally, since allowing the creche also permits it to gain the false appearance of speaking for all

20 Those who believe in the religious message of the creche could gather together on public property to proclaim it, have everyone who agrees with the message personally display creches on their own property, or have all of their churches, as a number of Scarsdale churches now do, display a creche. Each of these alternatives would allow the message to be proclaimed in an ecumenical way. Moreover, each would ensure that the scope of the ecumenical expression would not, at the expense of nonbelievers, appear broader than in reality it is.

of Scarsdale's residents, allowing the creche advances religion in violation of the Establishment Clause. In contrast to *Widmar*, not only does there appear to be an "imprimatur of State approval" when the creche sits at Boniface Circle; plaintiffs' actually seek it.

We note, too, that factors militating against the appearance of state support in *Widmar*, are absent here. First the community viewing the creche includes children who cannot be counted on to "appreciate that the [Village's] policy is one of neutrality toward religion." *Widmar, supra*, 454 U.S. at 274 n.14. Second, we cannot say on the record before us that "a broad class of nonreligious as well as religious" symbols, *id.* at 273, will abound in Scarsdale's parks thus minimizing the appearance of state support. Symbols in public parks are relatively rare, and it appears that only one religious symbol has been offered for display in Scarsdale's parks for as far back as anyone can recall. Whether a decision squarely holding that such symbols are permissible would encourage other religious adherents to display symbols is not clear—the record indicates that many feel it is inappropriate to display religious symbols on public property for moral and theological reasons, and that some might be reluctant to erect displays out of fear of generating animosity toward their religion.[21] Ironically, though, while a multiplicity of religous symbols on public property might lessen the appearance of state support for any or all, it would seem to increase the dangers discussed above with regard to public property performing a functional role as the message bearer, and would also increase the problems of entanglement. We note, finally, that even if privately funded and erected religious symbols became commonplace, the "lurking doubts" of state support would likely not be completely dispelled. History is simply too replete with the examples of government impermissibly seeking to bolster religion through the erection of signs and symbols to permit it. *See, e.g., Stone*

21 On this latter point, *see Fox v. City of Los Angeles*, 587 P.2d 663, 666 (Cal. Sup. Ct. 1978) ("there may be complex and troubling reasons why residents who are non-Christian [will choose] not to seek 'equal recognition and aid' ").

v. Graham, supra; *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981); *Goldstein v. Fire Department of Suffern*, 559 F. Supp. 1389 (S.D.N.Y. 1983); *Donnelly v. Lynch* 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 1766 (1983); *ACLU v. Rabun County Chamber of Commerce*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379(11th Cir. 1982), *op. modified*, 698 F.2d 1098 (11th Cir. 1983); *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. Sup. Ct. 1978); *Lowe v. City of Eugene*, 451 P.2d 117 (Or. Sup. Ct.), *op. withdrawn*, 459 P.2d 222, *rehearing denied*, 463 P.2d 360 (1969), *vacated*, 558 P.2d 338 (1976), *cert. denied*, 397 U.S. 1042 (1970).

The advancement problems are not cured by the placement of a sign next to the creche. First, a sign does not solve the problem of public land taking over the function of message bearer from adherents. Second, it is doubtful that a sign saying that a symbol has been "erected and maintained" by a private group will entirely eliminate the appearance of state support when public land is still the one visible thing to which the speech may be attributed. The Creche Committee was not sure that a sign would prevent its ecumenical message from being "destroyed" if the creche were displayed on church property, *see* Curran dep. at 56-57, and the record suggests, for reasons already stated, Scarsdalians continued to perceive that "aura of Village support" long after the Creche Committee began posting a sign in 1976. *Cf. Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (posting of notation under religious symbol did not avoid Establishment Clause violation.

We think, too, that if cases such as this were to turn on minutiae like the visibility or lack of ambiguity of disclaiming signs, *see Allen v. Morton*, 495 F.2d 65,89 (D.C. Cir. 1973) (Leventhal, J., concurring), the size or relative size of the symbol, the length of time for the display, or the potentially myriad other factors which possibly could be held to affect the outcome, the *courts* would become hopelessly entangled in the problem, and, perhaps more importantly, villages like Scarsdale would endlessly be in and out court.

Acknowledging that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," *Tilton v. Richardson*, 403 U.S. 672, 678 (1971), we nevertheless look in this case of novel impression for a clear rule of decision which strikes at the "common sense of the matter," *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). That rule, we think, is suggested by the approach former Mayor Stone took in making the obviously personally difficult decision to vote against the creche after having previously voted for it. The Mayor, a Christian, a non-lawyer, and someone who maintains a creche in her own home, Stone dep. at 48, was persuaded to vote against allowing the creche when she began to consider that private property was available for symbolic religious displays and that there was a difference between "a 'speaking' use" of public property for the dissemination of religious ideas and the erection of symbols to effect such a purpose. In her words, the creche was different because "the placement of the Creche in the center of the village . . . is more permanent, it is a solid seeable religious artifact . . . and you see it there in the heart of Scarsdale on village property like the village is supporting it." *Id.* at 18-19.

We hold that because the creche would be erected 1) for a time period not essentially contemporaneous with assembly, 2) in a public park visited by persons of "all stripes," and 3) not as part of an event having an overriding secular effect, *compare Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973), and *Donnelly v. Lynch*, 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 1766 (1983), it was proper for the Village to deny plaintiffs' applications in order to avoid contravening the Establishment Clause. Insofar as the Village's denials of access to plaintiffs have been consistent with and no broader than this holding, we also find that they have been sufficiently "narrow" to justify a denial of free speech access. *See Perry, supra*, 103 S. Ct. at 955. Were we to accept that displaying a creche on public property constituted a practice of plaintiffs' religion, we would reach the same conclusion with respect to their free exercise claims. The Creche Committee has not pressed its equal protection argument, but we think our holding is dispositive of that claim as well.

CONCLUSION

It may be that the line we have drawn in this case could have been drawn through some slightly different point on the continuum of factual degrees. But we consider that "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). The line we have drawn allows persons with religious views unfettered freedom to come onto public forum property to *personally* speak those views. We also think it would give them the unimpeded right, subject of course to reasonable time, place and manner restrictions, to bring religious symbols with them. *See O'Hair v. Andrus*, 613 F.2d 931, 933 (D.C. Cir. 1979) (papal mass in public park including display of "alter [sic] and other accouterments connected with the mass" did not violate Establishment Clause). Our holding leaves untouched the certain right, well practiced in Scarsdale, of persons with religious views to maintain symbols on private property around the clock and for as long as they wish. And, we think, it draws a boundary which does not question the right of religion to receive "general [governmental] benefits," *see Widmar v. Vincent*, 454 U.S. at 274, but which does allow government not to be "joined" in the promotion of religion. Finally, our holding provides at least some degree of predictability for all concerned.

The judgment is for defendants in all respects.

SO ORDERED.

CHARLES E. STEWART, JR.
United States District Judge

Dated: New York, New York
December 8, 1983

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No. 84-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

BRIEF IN OPPOSITION BY RESPONDENTS McCREARY ET AL.

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Respondents.

BRIEF IN OPPOSITION BY RESPONDENTS McCREARY ET AL.

Soon after the decision in *Lynch v. Donnelly* 104 S.Ct. 1355 (1984), this Court is being asked to decide whether a local Village government may prohibit a display during the Christmas holidays of a privately owned creche in a public park which is a focal point of the Village's traditional observance of Christmas. Indeed, this is the very case referred to by Justice Brennan in his dissent in *Lynch*.

> Inclusion of the creche [Pawtucket's] is not necessary to accomodate individual religious expression. This is plainly not a case in which individual residents of Pawtucket have claimed the right to place a creche as part of a wholly private display on public land. Cf. . . . *McCreary v. Stone*, 575 F. Supp. 1112 (1983). *Lynch*, at 1382.

The courts below were faced with reconciling Establishment Clause issues with Free Speech issues. The Respondents' First Amendment rights of free speech are not being asserted in face of a government regulation, narrowly drawn to further a substantial governmental interest unrelated to the suppression of free speech.

The unanimous decision of the Court of Appeals for the Second Circuit concluded that the Village of Scarsdale, New York, would not contravene the Establishment Clause by allowing the display of a creche in Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season. Further, the Court of Appeals confirmed the District Court's finding that the Village's prohibition of the creche display was content based. (Pet. App. 24a-25a).[1]

In light of this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Lynch*, and its decisions dealing with the abridgement of First Amendment Rights in traditional public forums, that conclusion was correct. The decision below presents no conflict with any decision of this Court or of any other Court of Appeals. The Petitioners have still not identified a governmental interest sufficient to warrant an abridgement of First Amendment Rights in traditional public forums. Further appellate review is therefore unwarranted and certiorari should be denied.

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[1] "Pet." refers to the Petition for Certiorari, "Pet. App." to the Appendix to the Petition for Certiorari, "J.A." to the Joint Appendix in the Court of Appeals, "J.Ex." to the Exhibit Volume thereto, and "Stip. Ex." to exhibits included in the stipulated materials in the District Court record.

STATEMENT

1. *The Citizens Group.* Respondents McCreary, et al. (the "Citizens Group") were all residents of the Village of Scarsdale at the time of the commencement of this case and are not representatives of any church or religious institution. Four of the members of the Citizens Group, along with 13 other residents, submitted an application to the Board of Trustees of the Village to display a creche in Boniface Circle during the 1982 Christmas season. The applicants stated that the request for the display was for the purpose of availing themselves of their "constitutional right of freedom of religious expression." (J. Ex. 94).

After the Board's denial of this application, the Citizens Group Respondents submitted a similar application for the 1983 Christmas season in February, 1983. The full text of this application appears below:

> The undersigned respectfully request permission to erect a "Creche" (*i.e.*, the Nativity Scene) on Boniface Circle between December 17, 1983 and December 26, 1983. This Creche is small and tasteful and is similar to a display which has been placed on Boniface Circle for many years during the Christmas season. This Creche is private personal property and should not be confused with the similar Creche owned by the Scarsdale Creche Committee on behalf of various Scarsdale Churches and Congregations.
>
> All expenses and costs of the erection and removal of the display will be borne by the applicants, as well as any direct or indirect maintenance costs incurred on the Boniface Circle premises. A notation will be placed on the display indicating that it is made by private citizens and that the Village of Scarsdale does not support or sponsor the display.

> Among the several purposes of the undersigned in making this request are desires to join in the Village's celebration of Christmas by giving recognition to the birth of Jesus Christ the occasion and namesake of the holiday, to communicate the Christmas message of peace and good-will to the Scarsdale community, to celebrate and express religious convictions, and to evoke a spirit of religious toleration and freedom of expression which is fundamental to the well being of our Village and our nation, all of which purposes are grounded in the undersigned's civil and Constitutional rights of free speech and religious expression. (J. Ex. 95-97).

2. *The Lack of Regulations.* There is no published statute, law, ordinance, rule or regulation in effect in Scarsdale that requires persons wishing to use Scarsdale's parks or other public properties first to apply for permission from the Board of Trustees; and there are no published standards upon which the Board bases its decisions to grant or deny applicants permission to use Scarsdale's parks or other public properties. (Pet. App. 3a-4a). There are no regulations in Scarsdale pertaining to the use of Boniface Circle and other parks in Scarsdale other than those dealing with leaving the site in a clean and orderly condition, responsibility for damage and possible requirements to obtain public liability insurance, that are relevant to this case.

3. *The Creche Tradition in Scarsdale.* For 24 successive years, the Village of Scarsdale, acting through its Board of Trustees, permitted a display by a committee of representatives of several area churches (the "Creche Committee") of a privately-owned creche in Boniface Circle for a short period of time during each Christmas season. The creche was erected, maintained and taken down by the Creche Committee. No public expense was involved in the display; the Village merely permitted access to the park. During this period, according to the Village Manager, the chief operating officer of the Village

since 1961, no one ever complained about the length of time the creche was displayed, and the display never created a single traffic or safety problem. Further, the record in this case discloses no evidence that the display of the creche in Boniface Circle interfered with the rights of others to the use of the park.[2] Further, the District Court did not find that "many" creches are "widely" displayed throughout the Village of Scarsdale. (Pet. 9 and 19).

Boniface Circle is the most appropriate site in the Village for a creche display. Each year the Scarsdale Chamber of Commerce (of which the Village is a member), after application to and approval by the Village, decorates the area in and around Boniface Circle with festive Christmas lights and garlands. In 1982, the large evergreen tree in Boniface Circle was decorated with Christmas lights by Village employees at the request of the Town Club, a private civic organization. The electricity for all these lights was paid for by the Village. In 1982 also, the annual Town Club-sponsored Christmas carol sing for Villagers took place at Boniface Circle as it had in several earlier years. The repetoire included songs honoring the birth of Christ. As a regular feature of this event, Santa Claus arrived in a Village fire truck and the Deputy Mayor welcomed all Villagers in attendance.

4. *The Creche "Controversy" in Scarsdale.* After some early questioning, the annual creche display in Boniface Circle was largely a non-issue confined to routine Board approvals until a member of the American Civil Liberties Union brought suit in 1976 challenging the constitutionality of the creche on grounds that the display violated the Establishment Clause. *Rubin v. Village of Scarsdale*, 440 F.Supp. 607 (S.D.N.Y. 1977). In this action the Village advised the court that:

> Defendant Village and its officials acted in regard to the Creche Committee's request in a manner no different

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2 If the decision of the Circuit Court is allowed to stand, the Citizens Group will defer to and support the Creche Committee's next application to display their creche in Boniface Circle.

than it would if presented with a similar request from a similar organization. (J.Ex. 103).

* * *

. . . that neither the intentions nor motives of defendant, Scarsdale Creche Committee, whether expressed or implied may be imputed to or attributed to the defendant, Village. . . . The Board of Trustees permitted a group of residents to use Village property as it would permit any other similar group seeking such permission. (J.Ex. 112).

Rubin was dismissed on jurisdictional grounds. In response to the *Rubin* litigation, the Law Committee of the Board of Trustees reviewed an earlier decision by the District of Columbia Circuit in *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973). As a result of this review, the Board formulated the following text for a sign to be placed by the Creche Committee next to the creche:

> This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization.

In 1975, a Trustee began to vote against the annual creche display, and in 1976 stated that a "symbol of religion should not be on public property." (J.Ex. 50). In subsequent years, additional Trustees voted against the creche display. In 1981, the Board by a 4-3 vote denied the Creche Committee permission to display the creche in Boniface Circle. As a result of this denial and the subsequent denials in 1982, as the District Court found, a "small uproar" occurred in Scarsdale. This consisted mainly of letters and signed petitions addressed to the Board, and in particular to Mayor Jean Stone, who had cast the deciding vote against the creche in 1981, although in earlier years as Trustee she had voted for the creche display. These letters and petitions, which are in the District Court record, were overwhelmingly in favor of maintaining the tradition of the creche display. Contrary to the assertion by the Petitioners (Pet. 18), there is nothing in the record in this case to suggest that these letters and petitions were not representative of the position of the majority of Scarsdale residents.

Although the District Court found that some candidates for the Board of Trustees have stated a position on the creche display, the record is clear that voting in Scarsdale has not yet been affected by the creche issue. (J.A. 48, paras. 103-109). Despite the attempt of the Petitioners to color the creche controversy as "fierce" and involving "threats", the controversy in Scarsdale has been peaceful.

5. *The Village's Defense.* Until the Village's answer to the Citizens Group's Complaint on March 30, 1983, the Village never took the position that it was in any way sponsoring the display of a creche or that a private display without any government expense, constituted an establishment of religion. When the Board, at an open meeting in December 1982, denied the residents permission to display a creche, it advanced no reasons for the denial. (J. Ex. 84-92). According to the Chairman of the Board's Law Committee, the Board did so because four Trustees found the display to be "socially undesirable". (Stip. Ex. 66, *The Scarsdale Inquirer*, December 16, 1982, p. 1).

In the proceedings below, the Village conceded that the creche display was a form of speech for First Amendment purposes and that the denials were content-based. Indeed the Village now argues, beyond Establishment Clause considerations, that despite having no contravailing content-neutral regulations supporting an independent substantial governmental interest, that this Court support the ban of the creche because of the content of its message.

6. *The Proceedings Below.* The District Court and the Court of Appeals were in large measure consistent in their analysis. As Petitioners state, the decisive point of disagreement was the Court of Appeals' conclusion that allowing the creche in Boniface Circle would not "have the direct and immediate effect of advancing religion" (Pet. 12), particularly in light of this Court's decision in *Lynch v. Donnelly.*

The Court of Appeals held that the Village would not contravene the Establishment Clause by allowing the display of the creche in Boniface Circle, a traditional public forum, for a period of about two weeks during the Christmas holiday season. It reversed the judgment of the District Court and remanded for the entry of an injunction prohibiting the Village from relying on the Establishment Clause as a reason for prohibiting erection of a creche in Boniface Circle and for further action regarding the adequacy of the existing disclaiming sign used by the Creche Committee. (Pet. App. 25a).

REASONS FOR DENYING THE WRIT

This is not a case in which there are "special and important reasons for granting certiorari". S.Ct. R.17(1). The conclusions of the Court of Appeals were correct based on the holdings of this Court in *Widmar v. Vincent*, *Lynch v. Donnelly* and its decisions dealing with the abridgement of First Amendment rights in traditional public forums like Boniface Circle. The holding of the Court of Appeals presents no conflict with any decision of this Court or any other Court of Appeals. The Petitioners have still not identified a governmental interest sufficient to warrant an abridgement of the First Amendment rights of the Citizens Group Respondents.

I. The Court of Appeals' Holding is Consistent with *Widmar v. Vincent*, *Lynch v. Donnelly* and other Decisions of this Court

The decision of the Court of Appeals below is not a "remarkable widening of the free speech rule" of *Widmar v. Vincent*. (Pet. 14). This case is well within the confines of *Widmar* and all other decisions of this Court that may constitute the "free speech rule". *Widmar* was based on a determination that the University of Missouri had created by its open access policy to student groups, a limited public forum. In this case both the District Court and the Court of Appeals found, and now the Village concedes on appeal that Boniface Circle,

like most parks, is "a traditional public forum". (Pet. 9). In addition, the University in *Widmar* sought only to prevent a student group from using its property; it did not seek to completely exclude the group from an important University event. In the present case however, the Village has attempted to ban the Citizens Group from participating in the Village's Christmas celebration. The Village, unlike the University, is actively involved in this celebration, permitting and endorsing symbols and other conduct concerning the Christmas holidays to be displayed and carried on in Boniface Circle and its immediate environs. After many years of taking a proper neutral stance of accomodation, the Village officials since 1981 have chosen to deny the Citizens Group and the Creche Committee access to Boniface Circle to present their Christmas message identifying the holidays with the birth of Christ.

The Court of Appeals found that "it is undisputed that throughout the years covered by this litigation, Scarsdale, acting through its Board, usually granted requests for access to and use of its parks and public properties. Rather than issue a complete denial, on each occasion that it did not grant a specific request, the Board usually chose to approve access to and use of alternative public property." (Pet. App. 4a). Nonetheless, the Village argued below and continues to argue that it has the right to single out the Respondents alone and deny them access to make their statement in Boniface Circle or alternative public forums in the Village. At the same time, it regularly permits religious symbolic displays in and uses of its public facilities, particularly by non-Christian groups, presumably because no one in the Village has objected to this accomodation. (Pet. App. 4a-5a; Pet. 4).

This Court has consistently held that absent a showing that the mode of communication interferes with the rights of others, or is basically incompatible with the normal activity of a particular place at a particular time, (*e.g.*, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969); *Gregory v. Chicago*, 394 U.S. 111, 112 (1969);

and *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)) only reasonable time, place and manner restrictions, content neutral and narrowly drawn to serve a significant governmental interest may permissibly abridge the exercise of First Amendment rights in traditional public forums. *United States v. Grace*, 103 S.Ct. 1702 (1983). No such rules or regulations exist in Scarsdale, and no showing has been made that the annual temporary display of a creche in Boniface Circle interferes with the rights of others. *Cf.*, *Clark v. Community for Creative Non-Violence*, 52 U.S.L.W. 4986 (U.S. July 2, 1984).

The decision of the Court of Appeals below is not a "marked extension" of *Lynch v. Donnelly.* (Pet. 14). In *Lynch*, this Court stated that it has invalidated government action in respect of the Establishment Clause "only when it has concluded there is no question that the . . . activity was motivated wholly by religious considerations". *Lynch* at 1362. Faced with the holding in *Lynch* that a government's display of a creche during the Christmas season does not violate the Establishment Clause, the Petitioners are forced to argue that *Lynch* is distinguishable. *Lynch*, however, may not be distinguished on any legally significant ground.

Contrary to the Petitioners' contention, the context of Pawtucket's display and the display in Boniface Circle are strikingly similar, both being in the context of a larger holiday display and celebration. In *Lynch*, the Pawtucket park was decorated with "many of the figures and decorations traditionally associated with Christmas . . ." *Lynch* at 1358. In Scarsdale, lamp posts in and around the park, and a large evergreen tree in the park are decorated with Christmas lights and ornaments of various kinds, and the park is the site of Christmas carol sings and visits by Santa Claus. In fact, Boniface Circle is the principal locus of the Village's Christmas celebration. (Pet. App. 29a). In short, the display in Boniface Circle, like Pawtucket's display,

> is essentially like those to be found in hundreds of towns and cities across the nation—often on public grounds—during the Christmas season. *Lynch* at 1358.

Indeed, this Court forcefully stated:

> To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places . . . would be a stilted over-reaction contrary to our history and to our holdings. *Lynch* at 1365.

The Petitioners suggest that the creche display in Boniface Circle promotes divisiveness and administrative entanglement. (Pet. 22). The District Court and the Court of Appeals below were both unimpressed with this argument. The District Court stated:

> The record does indicate the existence of a "divisive political potential" . . . However, a result in the lawsuit, one way or the other, would seemingly leave little to further political debate, and accordingly we do not see the divisiveness element as contributing much to entanglement. (Pet. App. 52a-53a)

In this case, as in *Lynch*, "there is no evidence of contact with church authorities concerning the content or design of the exhibit . . . No expenditures for maintenance of the creche have been necessary. . . In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries." *Lynch* at 1364.

Because in this case the Citizens Group Respondents' creche is privately owned and because the Citizens Group Respondents are not affiliated with any church, there is no interaction at all between church and state concerning the creche. Consequently, there is no administrative entanglement.

This Court's holding in *Lynch* that government sponsorship of a creche during the holiday season would not violate the Establishment Clause precludes the assertion that the mere "appearance of public sponsorship or endorsement or ap-

proval" (Pet. 16) would constitute such a violation by the Village in this case. In *Lynch*, where government support was actual—not merely perceived—the effect of such support was characterized as an "indirect, remote or incidental benefit" nct constitutionally infirm. *Lynch* at 1364.

The Citizens Group has never demanded "compulsory subsidization of their religious views" (Pet. 19), and there is nothing in the record to support such an inference. The District Court carefully distinguished the Citizens Group's motives from the Creche Committee's stating:

> In short, it appears that a dominant reason why the Creche Committee has wanted the creche at Boniface Circle is because Boniface Circle is public land. The position of the Citizens Group on this issue is simply that it has the right to place its creche on public property and therefore is not willing, pending outcome of this lawsuit, to settle for a private site. (Pet. 37a-38a).

The Citizens Group Respondents' right to display their creche on public land is no way affected by the availability of private sites, presumably their homes. "Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of expression in appropriate places abridged on the plea that it may be exercised in some other place'. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (citation omitted) (1974).

II. The Holding of the Court of Appeals Presents No Conflict with any Decision of any other Court of Appeals

The decision of the Circuit Court below is not in conflict with *ACLU v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982); *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983). *Rabun* involved a *permanent* cross erected on the side of a mountain in a state park, not a traditional public forum like Boniface Circle, nor even a

limited public forum as created by the University of Missouri. Indeed, as the Petitioners point out, there was no attempt in *Rabun* to justify the maintenance of the cross (a permanent structure) as permissible or required under *Widmar.* (Pet. 23 n.8).

The holding of the Court of Appeals is entirely consistent with *Allen v. Morton*, *supra*, *Florey v. Sioux Falls School District*, 619 F.2d 1311, 1316 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980), and *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 526 F. Supp. 1310 (D. Colo. 1981), *aff'd*, No. 82-1022 (10th Cir. filed May 14, 1984), the three known cases other than *Lynch* dealing with creche displays decided by federal Courts of Appeals.[3]

III. Petitioners have not identified a Governmental Interest Sufficient to Warrant an Abridgement of First Amendment Rights

The decision of the Circuit Court below prohibits the Village of Scarsdale from relying on the Establishment Clause for the reason for banning a creche display in Boniface Circle. It noted that the Village's prohibition was a problem because it was content-based (Pet. App. 24a-25a). In the Court of Appeals, the Village abandoned its argument that Boniface Circle is not a traditional public forum, but now in its Petition nevertheless suggests that it is a "special part of home" (Pet. 17), where "limits on symbolic communication, or even on political speech, may properly be allowed in cases where the counter-

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3 There is pending in the Court of Appeals for the Sixth Circuit an appeal filed on September 6, 1984 from the decision in *American Civil Liberties Union v. City of Birmingham*, Civ. No. 83-3348 (E.D. Mich. July 23, 1984), docketed in the Court of Appeals as No. 84-1637. Distinguishing *Lynch* and the decision of the Court of Appeals below, the District Court found that a display of a city-owned creche standing alone on the lawn in front of City Hall during the Christmas season without a disclaimer sign, and erected, maintained, illuminated and stored by public employees in public facilities, violated the Establishment Clause.

vailing interests at stake are themselves of constitutional dimension." (Pet. 19).

What the Village has done and is continuing to do by abstract argument and reliance on clearly distinguishable authorities is particularly repugnant to the principles of the First Amendment.

No countervailing interest of constitutional dimension other than the Establishment Clause has been identified in this case. *Cf.*, *Shelly v. Kraemer*, 334 U.S. 1 (1948); *Evans v. Newton*, 382 U.S. 296 (1966); *Norwood v. Harrison*, 413 U.S. 455 (1973); and *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983), cited by the Petitioners. This case does not involve a permanent or other display, where a separate governmental interest sufficient to warrant an abridgement of a claimed free speech right, was at stake. *Cf.*, *Members of the City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984); *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981); and *Lehman v. City of Shaker Heights* 418 U.S. 298 (1974), cited by the Petitioners. No showing has been made in this case that the temporary display of a privately-owned creche by citizens in context of surrounding Christmas decorations in a traditional public forum compels persons to "support ideas they find repugnant to their moral religious and political beliefs." (Pet. 17). *Cf.*, *Wooley, v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), cited by the Petitioners.

A local government which can arbitrarily grant or deny the right to speak according to what it deems to be "socially desirable", or in the "public interest" or "welfare" of the community is indistinguishable in all relevant respects from a censor. This Court has consistently held that such prior restraint without adequate standards is precisely the sort of abuse against which the First Amendment was primarily directed. *See*, *e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1974); *Shuttlesworth v. Birmingham*, 394

U.S. 147, 153 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); and *Saia v. New York*, 334 U.S. 558, 559 (1948).

If the Village of Scarsdale wishes to regulate speech, then it must undertake the burden to show a precise nexus between that speech and some evil that it has a right to prevent. Further, the Village must make a "specific showing of constitutionally valid reasons" for doing so. *Tinker v. Des Moines Independent Community School District*, *supra*, at 511. If the First Amendment means anything at all it requires at least that a speaker be given a judicial determination that such a nexus or valid reason exists before the state can silence him. An undefined "Lex Scarsdale" based wholly on the political temperaments of its public officials is not sufficient. *See*, *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); and *Southeastern Promotions Ltd.*, *supra*, at 560. No such nexus or valid reason has been demonstrated in this case, nor do they exist.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

September 11, 1984

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No. 84-277

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—VS.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

—and—

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 13, 1984

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-277

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

—and—

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The United States Court of Appeals for the Second Circuit held in this case that the Establishment Clause neither required nor justified the Village of Scarsdale's content-based refusals to permit a private group's temporary

display of a creche during the Christmas holiday season in a public park, a "traditional public forum" (App. 24a).*

As Judge Pierce wrote for the unanimous panel below (App. 2a), that holding was based upon the "controlling precedents" of *Lynch* v. *Donnelly*, -- U.S. —, 104 S. Ct. 1355 (1984) and *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In *Lynch*, this Court held last term that the City of Pawtucket, Rhode Island did not violate the Establishment Clause when, in the context of the Christmas holiday season, it purchased, maintained and displayed a life-size nativity scene—"notwithstanding the religious significance of the creche." 104 S. Ct. at 1366. In *Widmar*, this Court held that the Establishment Clause neither required nor justified the University of Missouri's discriminatory content-based exclusion of one student group's religious speech from a public forum made available to all other student groups. 454 U.S. at 276-77.

Applying those two recent precedents, and observing that unlike *Lynch*, this case involves "merely accommodat-[ing] a privately-owned creche in a public park that is a traditional public forum" (App. 23a), with "no . . . active involvement, sponsorship or financial support by the Village" (*id.*), the Court of Appeals found *"a fortiori*, the Village's neutral accommodation herein to permit the display of a creche in a traditonal public forum . . . cannot be . . . violative of the establishment clause" (App. 19a).

The Village seeks certiorari on the theory that the Second Circuit's decision reflects "marked extensions" of *Lynch*

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* Citations in the form "App. ——" refer to the designated page in the Appendix to the Village's Petition; "Vill. Pet. ——" to the Village's Petition; "J.A. ——" to the Stipulation of Facts contained in the Joint Appendix in the Court of Appeals; and "J. Ex. ——" to the Exhibit Volume thereto.

and *Widmar* (Vill. Pet. 14) and "represents a profoundly dubious ordering of the First Amendment values pressed on both sides of the case" (*id.* at 20).

That argument is without merit. The decision of the Court of Appeals was compelled by *Lynch* and *Widmar* and marks no extension of this Court's holdings in those cases.* The Village advances no valid reason why certiorari should be granted.

ARGUMENT

I.

The Decision of the Court of Appeals Was Compelled By This Court's Decisions in *Lynch* v. *Donnelly* and *Widmar* v. *Vincent*.

A. *Lynch* dictates *a fortiori* that the Creche Committee's display of its creche at Christmas does not offend the Establishment Clause.

The Village argues that *Lynch* does not dispose of its Establishment Clause defense, urging that "significant

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* Petitioners advance their own implausible "extension" that if the Village is compelled by the Constitution to permit the temporary display of a creche during Chrismas at the very public park in which the Village celebrates the holiday by prayer and carols around a Village-decorated Christmas tree, then the Village must also permit the erection of a six-foot swastika for a week or so around Hitler's birthday or the display in Orthodox Jewish neighborhoods at Yom Kippur of banners proclaiming "God does not hear the prayers of Jews" (Vill. Pet. 16-17). What the Village seems to forget is that it has *never* prohibited a temporary display or symbol in Scarsdale's public parks: all appplicants for symbolic displays have been accommodated—except for Respondents. The Village likewise seems to forget that it has never adopted an ordinance imposing neutral and reasonable "time, place and manner" restrictions upon the erection of symbolic displays in its park system, *cf. Clark* v. *Community for Creative Non-Violence*, —— U.S. ——, 52 U.S.L.W. 4986, 4989 (June 29, 1984); *Members of the City Council* v. *Taxpayers for Vincent*, —— U.S. ——, 104 S. Ct. 2118, 2130 (1984), and that the only display it has censored is the creche at Christmas time. The Village's parade of horribles has no relevance to the facts of this case.

differences" distinguish this case (Vill. Pet. 20). That argument, asserted by the Village below, was rightly rejected by the Court of Appeals. As a matter of law (and common sense),

> If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori,* the Village's neutral accommodation herein to permit the [private] display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause (App. 19a).*

Although the point was obvious, the Court of Appeals nevertheless analyzed the "significant differences" raised by the Village and found each of the Village's contentions without merit:

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* Indeed, long before this Court decided *Widmar* and *Lynch,* the Village itself recognized that its neutral accommodation of the Creche Committee for 24 years could not offend the Establishment Clause. When sued in 1976 on constitutional grounds for permitting the Creche Committee's traditional Christmas display, the Village argued in the Southern District of New York: "[T]he Village of Scarsdale granted permission to the Scarsdale Creche Committee to use Village property in the same manner as permission is customarily granted by the Village to any other local organization" (J. Ex. 98, ¶ 4); "[N]either the intentions nor motives of the Scarsdale Creche Committee . . . may be imputed to . . . the defendant Village" (J. Ex. 98-99, ¶ 5); "The Village has done nothing to the plaintiff here, or anyone else, by way of establishing a religion which must be joined or supported, nor conversely has it prevented anyone from exercising his own religious beliefs or lack of them" (J. Ex. 110); "In simple terms, [the Creche Committee's] creche in Boniface Circle in Scarsdale was a part of a traditional celebration of the Christmas season" (J. Ex. 116). The suit was dismissed on procedural grounds, *Rubin* v. *Village of Scarsdale,* 440 F. Supp. 607 (S.D.N.Y. 1977), but as *Widmar* and *Lynch* confirmed, those original assertions by the Village were and remain entirely correct.

1. The Village's "display" argument (Vill. Pet. 21) is wrong both in fact and in law. As the Court of Appeals observed (and as a matter of stipulated fact),

> the Christmas celebration in the Village is not significantly different than the Christmas celebration described in *Lynch.* In Scarsdale, the Village is decorated with many traditional symbols of Christmas. Moreover, Boniface Circle has been the recent site of the Christmas Carol Sing and the site of numerous Christmas decorations" (App. 22a-23a).*

More importantly, this Court held in *Lynch* that the focus of the Establishment Clause inquiry was directed at the creche "in the context of the Christmas season." 104 S. Ct. at 1362. *See also id.* at 1365 ("To forbid the [*government's*] use of this one passive symbol—the creche *—at the very time people are taking note of the season* with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings") (emphasis added).**

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* Boniface Circle is also the site of Santa Claus' arrival on a Village-owned fire truck and the Scarsdale Chamber of Commerce's season-long broadcast of recorded Christmas music (*see, e.g.,* J.A., 78-79, ¶ 56; J.A. 81, ¶ 60). In addition to being the "recent" site of Scarsdale's Christmas Carol Sing, Boniface Circle was, since at least as early as 1959, the *traditional* site of the Town Club's annual Christmas caroling (*see, e.g.,* J.A. 79-80, ¶ 58). It was the annual gathering of Christmas carolers in this centrally-located park which first inspired the Creche Committee to request permission to temporarily display a creche at Boniface Circle (J. Ex. 254, 267).

** The Village nevertheless suggests that this Court's description of individual components in Pawtucket's Christmas display was not

(footnote continued on following page)

2. There is no substance to the Village's claimed private/public land distinction (Vill. Pet. 21-22). In *Lynch*, the government was *in fact* (rather than, as here, in theory) the "message bearer" since "[t]he Pawtucket creche had been displayed for forty or more years with active involvement by the government, including funding . . . and sponsorship by the city" (App. 23a). Moreover, as the Court of Appeals emphasized in rejecting the Village's "land as the message bearer" theory,

> We believe that a proper disclaimer message—especially when coupled with the presence of the valid secular purpose, the lack of excessive entanglement, the Village's general grants of access to its public properties and the publicity the Village's official views have received in Scarsdale [namely that it does not support or endorse the creche]—will ensure that no reasonable person will draw an inference that the Village supports any church, faith or religion associated with the display of a creche during the Christmas season at Boniface Circle" (App. 22a).

3. Finally, the Village's persistent attempt to distinguish *Lynch* on the ground of "political divisiveness" raises a non-issue. This Court held in *Lynch* that no inquiry into the potential for "political divisiveness" is called for unless direct subsidies to religious institutions are challenged. 104 S. Ct. at 1364-65, *citing Mueller* v. *Allen*, —— U.S.

(footnote continued from preceding page)

"trivial or immaterial" (Vill. Pet. 21 n.7). While Scarsdale's celebration of Christmas is constitutionally indistinguishable from Pawtucket's, it would indeed be "trivial" to hold (as the Village urges) that a *privately-owned* creche may be constitutionally displayed at Christmas only if flanked by the requisite number of reindeer and teddy bears.

——, 103 S. Ct. 3062, 3071 n.11 (1983).* This is not such a case.

Even were such an inquiry into "political divisiveness" relevant here, the Establishment Clause would not license Scarsdale to silence a private group's speech in a traditional public forum on the ground that that group's request to speak is potentially "divisive." As Justice Brennan said in *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978):

> The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association . . . . [The Establishment Clause] may not be used as a sword to justify repression of religion or its adherents from any aspect of public life (concurring opinion) (citations and footnote omitted).

B. *Widmar* dictates that the Village's content-based exclusion of the Creche Committee from a traditional public forum violated Respondents' First Amendment rights to freedom of speech.

The Village asserts that the Court of Appeals' decision distorts *Widmar* and violates "cherished principles of free expression" (Vill. Pet. 17). According to the Village, even if the Establishment Clause does not dictate that it "must" prohibit access to Boniface Circle, it nevertheless "may" exclude the Creche Committee from a traditional public forum. Citing cases which have no relevance here, the Village argues that the public park—the "quintessential" public forum whose special status in First Amendment jurisprudence has been repeatedly confirmed by this Court

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* Justice O'Connor suggested in her concurrence in *Lynch* that the "political divisiveness" test should be abandoned as an independent test of constitutionality. 104 S. Ct. at 1367. *See also* Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980).

at least since *Hague* v. *C.I.O.*, 307 U.S. 496 (1939)*—is now a "special part of home" where unwanted messages may be censored on a content basis without regard to reasonable time, place and manner regulations (Vill. Pet. 17).**

Those propositions are the direct antithesis to this Court's expositions of the First Amendment. We had thought that the "cherished principles of free expression" which govern here are the most basic and the most familiar and are as controlling in Scarsdale as they are elsewhere:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control . . . . There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

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* *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, —— U.S. ——, 103 S. Ct. 948, 955 (1983). *See also United States* v. *Grace*, —— U.S. ——, 103 S. Ct. 1702 (1983); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

** The Village does not have a statute, ordinance, rule or regulation which sets forth the standards or guidelines upon which Scarsdale's Board of Trustees bases its decisions to grant or deny applicants permission to use Village parks or other public property (App. 3a-4a; J.A. 70-71, ¶ 44). Rather, the Village's seven trustees determine *ad hoc* who is entitled to use Village property and under what conditions (App. 43a n.8).

> Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972) (citations and footnote omitted).
>
> * * *
>
> The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. *Widmar* v. *Vincent*, 454 U.S. 263, 267-68 (1981).*

Moreover, less than four months ago, this Court stressed that while a neutrally-applied content-free regulation of display signs on public property is constitutionally permissible,

> there are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others.
>
> * * *

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* *See also Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975) ("Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law"); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Women Strike for Peace* v. *Morton*, 472 F.2d 1273, 1276 (D.C. Cir. 1972) (federal government may not "pick and choose among citizens wishing to communicate their views" in a public park); *U.S. Southwest Africa/Namibia Trade & Cultural Council* v. *United States*, 708 F.2d 760, 769-70 (D.C. Cir. 1983) (government may not censor "controversial" political displays in such public forums as National and Dulles Airports).

> That general rule has no application to this case. For there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral . . . concerning any speaker's point of view and the District Court's findings indicate that it has been applied to appellees and others in an even-handed manner. *Members of the City Council* v. *Taxpayers for Vincent*, —— U.S. ——, 104 S. Ct. 2118, 2128-29 (1984) (citations omitted).

The Establishment Clause was not offended in the twenty-four years that the Creche Committee was allowed to temporarily display its creche in order to express "the real significance of Christmas time" (Vill. Pet. 3, *quoting* J. Ex. 1). What *was* offensive to the First Amendment was the Village's discriminatory content-based refusal to permit continued access to a traditional public forum, solely because the Creche Committee sought to express ideas which *some* people in the community "reject[ed,] or oppose[d] or [found] offensive" (Vill. Pet. 17).

CONCLUSION

The Village's Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

The two briefs in opposition, if not with entire consistency, treat the first question presented—as to the validity of respondents' basic free speech claim under *Widmar v. Vincent*, 454 U.S. 263 (1981)—by ignoring or twisting or trivializing it.

The Scarsdale Creche Committee relegates the question to a diversionary footnote. It says (3 n.*) "the Village seems to forget . . . that it has *never* prohibited a temporary display or symbol in Scarsdale's public parks: all applicants for symbolic displays have been accommodated—except for Respondents."

Accepting it as accurate for present purposes, that observation is entirely misleading. As stated in the petition (pp. 3-4), symbols heretofore displayed in Scarsdale's public parks have been, for present purposes, wholly innocuous, *i.e.*, never controversial. The crèche is thus far the only symbol that has generated "growing" and "escalating division" and "controversy" (Pet. App. 31a, 32a, 33a, 34a), "precisely because an aura of Village approval has adhered to it" (Pet. App. 56a). This is what the case is about—claimed rights of some citizens to free expression versus claimed rights of other citizens not to have the shared land bear a symbolic message that makes them feel alien or outcast in their own Village or compulsorily supportive of a faith they either do not share or wish to witness privately, not via government sponsorship.

Ignoring this essential character of the problem, in Scarsdale and elsewhere, cannot cause the disappearance of the vexing concerns raised in the petition (pp. 14-20). The display of other symbols, devoid of ideological or religious content, is no more pertinent to this case than were amiable legends on other license plates (*e.g.*, Arizona's "Grand Canyon State," Hawaii's "Aloha State," Minnesota's "10000 Lakes") to the slogan "Live Free or Die" involved in *Wooley v. Maynard*, 430 U.S. 705 (1977).

In an equally cursory but divergent treatment, the *McCreary* respondents also say (Br. in Opp. 9) the Village claims a "right to single out the Respondents alone" for adverse treatment. Expanding on that, and slightly alchemizing the record, these respondents say (*id.*) the Village "regularly permits religious symbolic displays in and uses of its public facilities, particularly by non-Christian groups, presumably because no one in the Village has objected to this accomodation [sic]." The record reveals *no religious symbol whatever*, other than the crèche, placed and left for days or weeks in a public park in Scarsdale. Religious speech and symbols in the library or other public buildings (Pet. App. 4a, 56a), in connection with religious services or artistic or scholarly displays, are obviously different and have for obvious reasons engendered no protests or community strife.

The suggestion of a preference for "non-Christian groups" is an oddly tendentious use of the record. It is materialized from the Court of Appeals' mention of Jewish, Bahai and Christian groups that have held services in Village buildings (Pet. App. 4a-5a). There is no evidentiary or logical basis for describing these as being uses "particularly by non-Christian groups."

The foregoing points are not major in themselves. They bring forth this brief reply mainly so that the serious submissions in the petition may not be obscured or distorted. The contentions herein noted should not serve, petitioners urge, to erase the significant differences in this setting between oral speech and live speakers, on the one hand, and ideologically or religiously charged symbols, on the other, brigaded for days or weeks with the shared public land as "message bearer" (Pet. App. 55a). Whether a municipality *must* allow such symbols, those most citizens may hate along with those most citizens may cherish, remains a question clearly presented and clearly worthy of review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Were the actions of the Village in denying respondents permission to display the creche on public property a permissible means under *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984), of avoiding a violation of the Establishment Clause of the First Amendment to the U.S. Constitution?

2. Was the district court judgment correct that the semi-permanent posting of an unattended creche on public property constitutes government endorsement of religion — endorsement barred by establishment principles—nullifying any putative individual rights under *Widmar* v. *Vincent*, 454 U.S. 263 (1981), to have government involved in religious expression?

3. Was the Village correct in allowing the use of the park to all its citizenry free of semi-permanent religious symbolism?

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Constitutional Authority

U.S. Constitution, Amendment I	*passim*

INTERESTS OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed *amicus* briefs before in such cases as *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and *School District of Abington Township, Pennsylvania* v. *Schempp*, 374 U.S. 203 (1963). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

This brief is also submitted on behalf of the National Jewish Community Relations Advisory Council, and its following national member agencies: B'nai B'rith — Anti-Defamation League, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America — National Women's League for Conservative Judaism, Women's American ORT, and the lll Community Member Agencies representing all major Jewish communities in the United States. These communities are listed in Appendix "A."

The Jewish community, through the actions of its representative agencies, has long sought to insure that church and state are

kept separate. As a small religious minority in this country, commitment to the separation principle serves to help maintain the Jewish community's status as political and civic equals.

The *amici* believe that, rather than serving to derogate from the individual and collective exercise of religious liberty, the separation of church and state is an integral and indispensable guardian of that liberty.

STATEMENT OF THE CASE

Amici adopt the statement of the parties to this appeal which is recited at length in their respective briefs.

INTRODUCTORY STATEMENT

This case raises important questions about the constitutionality of the unattended display on public park land for two weeks of a solitary nativity scene. At issue is whether the Village allowance of the display of an unattended, solitary nativity scene standing on government park property constitutes government support of religion in violation of the first amendment establishment clause.

Amici submit that the erection and display on government land of the isolated nativity scene herein, a concededly religious symbol, without the context of any surrounding secular setting, impermissibly advances religion. Accordingly, the Village of Scarsdale's denial of permission to display the creche is necessary to avoid violation of the establishment clause.

The district court decision in this case held that the Village allowance of the display herein would violate establishment concerns. It determined that while there was a free speech right to access to the Boniface Circle Park, the Village of Scarsdale's denial of access to the public park land was justified because of the establishment problems posed by the display of an exclusively religious nativity scene unattended for two weeks on government land. 575 F. Supp. 1112, 1125-1126. In reversing the district court's holding as to the establishment question, the Second Circuit held that the right of access to Boniface Circle could not be defeated by establishment concerns because the display of the unattended

solitary nativity scene in the Scarsdale Park was constitutionally permissible under this Court's decision in *Lynch* v. *Donnelly*, 104 S. Ct. 1355. Slip op. at 28. This analysis, *amici* submit, is incorrect.

The Scarsdale creche stands alone on government land, without any other secular symbols and without an accompanying speaker. As such, it is both a religious symbol bereft of the holiday setting held crucial to the *Lynch* decision, 104 S.Ct. at 1362, 1365, and it avails itself of greater government sponsorship than what the Court deemed to be "*de minimis*" aid sustained in *Lynch*, 104 S. Ct. at 1364, through the unattended use of government land which bespeaks government support. These factors create an establishment problem barring the Village display of an unattended exclusively religious nativity scene on public park land.[1]

Should this Court determine there is no establishment concern posed by the unattended religious symbol standing on government land in this case, it would relegate a question of constitutional proportions — the extent to which government may aid religion — to legislative fiat or majority rule. Perhaps in certain situations such as this Court deemed to be present in Pawtucket, the majority or government sponsorship of religious symbols will, because of its secularized setting and "*de minimis*" aid not be deemed violative of constitutional concerns. Or perhaps as in Scarsdale, a village will itself be sensitive enough to deny permission to private citizens seeking to use government land as the message bearer for their particular religious symbols. But Pawtucket and Scarsdale

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1. *Amici* also opposed the government sponsorship of the nativity scene display in *Lynch*. *See* Brief *Amici Curiae* of the Anti-Defamation League of B'nai B'rith and the American Jewish Congress in support of Respondents, *Lynch* v. *Donnelly*, 104 S. Ct. 1355. This sponsorship, however, was upheld by the majority of this Court. Without here reexamining the merits of that decision, *amici* submit, and this Court appears to have agreed in granting *cert.*, that this case raises different questions concerning government support for religion. At issue is whether government may dedicate its land to the religious use sought herein — the display for half a month of the concededly religious and sectarian nativity scene.

are far from representative. All across this nation, local governments are requested to aid sectarian religious displays. In many cases, those governments have approved such displays and then they have become the subject of court challenges. *E.g., ACLU v. City of Birmingham,* No. 83-CV-3348-DT (E.D. Mich. July 23, 1984) (striking solitary nativity scene standing on city hall premises), *appeal pending,* No. 84-1637 (6th Cir. 1984). And where these have been rejected, as in the instant case, the issue has become a political one with, as here in Scarsdale, politicians campaigning based upon their stand on this issue. (J.A. 98-99, 100; J.Ex. 191-1306).

The issue of government aid for religious symbols is not appropriate for political or majority decision-making, *amici* submit. The nativity scene and comparable religious symbols for the more than 300 religions and sects flourishing in the United States are best served by protecting them from the vagaries of the political process, where they are subject to both governmental promotion and interference. That is the mandate of the first amendment establishment clause.

In the absence of such establishment mandate, as this Court held in *Lynch,* the authority of each local government remains — to determine for itself whether to provide aid to religious displays. This authority, exercised here by the Village of Scarsdale, is challenged on the basis of an alleged countervailing constitutional right of free speech. Contrary to the court of appeals' holding herein, however, there is no unfettered free speech right to erect and display unattended semi-permanent religious symbols on government land. The unattended religious symbol display herein creates the impression of government support for religion. This support violates establishment principles. *See Stone* v. *Graham,* 449 U.S. 39, 42 (1980); *ACLU* v. *Rabun,* 678 F.2d 1379, 1390 (11th Cir. 1982).

It is this government support of a private party's particular religious symbol which is at issue in this case. For respondents claim a right to such government support. They have been offered many sites for their nativity scene, both commercial and religious.

575 F. Supp. at 1120. In seeking only public property the Creche Committee declared that use of a church site would destroy their "ecumenical" objective. *Id.* This "ecumenical" objective of seeking government endorsement for particular religious expression impermissibly blurs those lines which hitherto have separated and protected both government and religion. In so determining and in rejecting permission for display of the unattended nativity scene at issue herein, the Village of Scarsdale acted within the bounds of its authority and pursuant to the dictates of our Constitution.

I

THE ESTABLISHMENT CLAUSE BARS THE SEMI-PERMANENT UNATTENDED DISPLAY OF A RELIGIOUS SYMBOL ON GOVERNMENT PARK LAND.

A. The Effect of the Unattended Semi-Permanent Creche is the Advancement of One Religion to the Exclusion of Other Religious Minorities.

1. The presence on public land of the nativity scene without a surrounding secular context impermissibly advances one religion.

In *Lynch*, this Court in its majority, concurring and dissenting opinions agreed that the creche is a religious, sectarian symbol. 104 S. Ct. at 1365, 1369, 1377. The Court held that "[o]f course the creche is identified with one religious faith," 104 S. Ct. at 1365, but "notwithstanding the religious significance of the creche," 104 S. Ct. at 1366, the creche in the context of its surrounding display, which in Pawtucket included carollers, candystriped poles, a clown, elephant and bear, did not contravene the establishment clause.[2]

> When viewed in the proper context of the Christmas holiday season, it is apparent that, on this record, there is insufficient evidence to establish that *the inclusion of the*

2. Like the majority, the dissenters also find the creche to be a religious symbol but they viewed that: "[E]ven in the context of Pawtucket's seasonal celebration the creche retains a specifically Christian religious meaning." 104 S. Ct. at 1377 (Brennan, J., dissenting).

> *creche* is a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message.

Lynch, 104 S. Ct. at 1362-63 (Burger, J., majority opinion) (emphasis added).

And the Court noted, "it would be ironic . . . if *the inclusion of a single symbol* . . . would so 'taint' the city's exhibit as to render it violative of the establishment clause." *Lynch*, at 1365 (emphasis added).

The importance of the "secularizing" context of the Pawtucket creche as held by the Court[3] reflects a longstanding concern that where there is government sponsorship of a religious dispiay, it impermissibly advances religion where it is not integrated into a secular context. *See, e.g., Stone* v. *Graham*, 449 U.S. 39 (1980) (striking posting of Ten Commandments on schoolhouse wall, not integrated into school curriculum); *Abington* v. *Schempp*, 374 U.S. 203 (1963) (striking bible reading in public schools not part of secular program of education). The secular context is seen as diminishing the religious component, which the Court concedes if analyzed alone would "inevitably lead to its invalidation under the establishment clause." *Lynch*, 104 S. Ct. at 1362.

How the admittedly religious creche is mitigated by the secular Pawtucket holiday setting is highlighted by Justice O'Connor:

3. Without analyzing the merits of the "context" argument, it was central to the holding accepted by the majority in *Lynch*. Since *Lynch* governs this case on this point, the "context" principle enunciated in *Lynch* must be applied here. Lower courts prior to *Lynch* have also found that the context in which the religious symbol occurs can secularize an otherwise prohibited effect of advancing religion. Thus, in *Citizens Concerned for Separation of Church and State* v. *Denver*, 526 F. Supp. 1310 (D. Colo. 1981), the court found that the inclusion of the creche in an overall Christmas display where the creche is of equal prominence with Santa Clause and reindeer minimizes both its importance as a religious symbol and the citizens' perception of it as an endorsement by the city of Christianity. In *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973), the court held that the creche's setting in the Christmas pageant of peace alongside trees, reindeer and a yulelog, diminished its effect of advancing religion.

> Although the religious and indeed sectarian significance of the creche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display....

Lynch, 104 S. Ct. at 1369.

Bereft of the "overall holiday setting" present in Pawtucket is the Scarsdale nativity scene. It would stand alone in Boniface Circle, without any other more secular symbols of the Christmas holiday.

Clearly the nativity scene which would stand in Boniface Circle is a religious symbol of one faith — Christianity. This is conceded by the Court in *Lynch*. *See* 104 S. Ct. at 1365, 1366, 1369. Whereas this Court held that the nativity scene's religiosity is mitigated by the secularizing context present in the Pawtucket display, 104 S. Ct. at 1362, 1365, 1369, no such context is present here. *Lynch* which governs this case and caselaw, decided both prior and subsequent to *Lynch*, which consider the constitutionality of a nativity scene standing alone on government property have held that the exclusively religious nature of the display renders it unconstitutional. Thus, in applying the *Lynch* decision to a creche standing alone on city hall land the district court in *ACLU* v. *Birmingham*, No. 83-CV-3348-DT (S.D. Mich. July 23, 1984), *appeal pending*, No. 84-1637 (6th Cir. 1984), expressly noted that the creche had no surrounding holiday context: "This creche is displayed on the lawn of the city hall . . . there is nothing else displayed for the season on the lawn of city hall. There are no secular objects included with this creche." Slip op. at 3. This lack of secularizing context was the basis for the court's distinction from *Lynch*:

> This case is completely unlike the *Lynch* case. Here, the nativity scene stands alone on public property, conveying only the religious message of the Christmas season, suggesting nothing of the secular pleasure and good will of the season, which Justice Burger found to be the emphasis of the *Lynch* display.

ACLU v. *Birmingham*, slip op. at 5.[4]

Similarly, other religious symbols have been struck down when not integrated into a secularizing context. In *ACLU* v. *Rabun*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (llth Cir. 1982), the court held that a cross, an obviously Christian symbol, when placed on public land has no other effect but to advance impermissibly the cause of the underlying religion. As the Oregon Supreme Court noted in *Lowe* v. *City of Eugene*, 254 Or. 518, 463 P.2d 360 (Or. 1969), *cert. denied*, 397 U.S. 1042 (1970), "[t]he employment of publicly-owned and publicly-maintained property for a highly visible display of the character of a cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol."*Id.* at 363. Similarly, in *Goldstein* v. *Fire Department of the Village of Suffern*, 559 F. Supp. 1389 (S.D.N.Y. 1983), although invalidating the practice under the purpose prong of the tripartite test, Judge Werker noted that the presence on public property of a sign proclaiming "Keep Christ in Christmas," "created the obvious impression that defendants either were promoting or approving the theological origins of Christmas." *Id.* at 1391. And, in *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980), the city of Philadelphia erected an impressive platform complete with a cross from which Pope John Paul II was to offer mass on his visit to the city. The platform which was left standing for more than a week to allow residents to observe it provided the setting for the Pope to deliver his prayers. The aid of the city in erecting the platform was held to be an impermissible advancement of religion.[5]

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4. *But see, ACLU* v. *Harris County*, No. 83-2549 (5th Cir. March 30, 1984) where the Fifth Circuit affirmed a district court order upholding the constitutionality of two nativity scenes displayed on city courthouse property.

5. Other courts in focusing on the danger of these symbols on public land have found the practice invalid under the purpose prong of the tripartite test and have not had to reach the question of effect. *See, e.g., Stone* v. *Graham*, 449 U.S. 39 (striking posting of Ten Commandments on public school walls); *Fox* v. *City of Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663, 150 Ca. Rptr. 867 (Cal. 1978)(holding unconstitutional a cross on public property).

The importance of the context of government sponsorship of a religious symbol is clear from the above caselaw and this Court's decision in *Lynch*.

Without a secularizing context what is at issue here is the solitary nativity scene. As characterized by Justice Brennan in *Lynch*: 'It is . . . best understood as a mystical re-creation of an event that lies at the heart of Christian faith." 104 S. Ct. at 1378.

> It is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path towards salvation and redemption. For Christians, that path is exclusive, precious and holy. But for those who do not share these beliefs, the symbolic re-enactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith.

104 S. Ct. at 1377.

In Scarsdale, it is this exclusively religious symbol standing alone for which respondents seek government land. Under *Lynch*, this donation of government land to an exclusively religious sectarian symbol display, without any secularizing setting constitutes government aid to one religion — in contravention of this Court's principles barring such establishment. *See also Stone* v. *Graham*, 449 U.S. at 42. To hold otherwise is to have *Lynch* become carte blanche for all those seeking to use public property for their religious uses.

> 2. *The use of government land for display of an unattended nativity scene provides a substantial benefit to religion.*

The aid sought in this case is of far greater benefit to religion than the funding provided in *Lynch*. As this Court held in *Lynch*, the extent of government aid involved in the Pawtucket case was "*de minimis*" — the $200 value of the creche which the city owned. 104 S. Ct. at 1364. While city-owned, the creche and the

largely secular display at issue in *Lynch* stood on private, not government property.

In contrast, the creche herein would stand in a public park, thereby availing itself of the government imprimatur borne by government land. The impact of such an imprimatur has been recognized by this Court in its decisions. In *Lynch*, this Court contrasted the minimal funding provided by Pawtucket in paying for the creche with the aid involved in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).[6] In *McCollum*, this Court noted that the government had used "the public school building for teaching of religion." 333 U.S. at 212, *cited approvingly in Lynch*, 104 S. Ct. at 1364. This use of government buildings together with the use of state attendance laws, constituted a substantial benefit. 104 S. Ct. at 1364. The donation of the public premises to religious speakers, held to aid religion in *McCollum*, is just like the land in Scarsdale. In both, the religious message, while private in its origins — outside religious instructors in *McCollum* and the private creche committee in Scarsdale — is afforded substantial government benefit. This benefit is the use of government property for promotion of a religious message. Moreover, in Scarsdale, unlike *McCollum*, there are no accompanying transient private speakers which could mitigate the appearance of the government endorsement of the religious expression.

The substantial benefit accorded to religion when public land is used for the display of a nativity scene is characteristic of the aid involved when other religious symbols are displayed on public premises, as is recognized in the many cases striking this aid. *See, e.g., Stone* v. *Graham*, 449 U.S. 39, 42 (in striking Ten Commandments posted on public classroom walls on religious purpose

6. As *Lynch* shows, the origin of the funding for religious symbol displays, whether public or private, is not dispositive. Instead, the establishment focus is on the extent and nature of government support for a particular religious activity. *Compare Lynch*, 104 S. Ct. 1355, 1364 (supporting publicly funded creche display on private property) *with Stone v. Graham*, 449 U.S. 39 (striking privately funded posting of Ten Commandments on public school walls) *and Engel* v. *Vitale*, 370 U.S. 421, 431 (1962) (striking state and school sponsored prayer in public schools).

basis, the Court held "mere posting of the copies under the auspices of the legislature provides the 'official support of the . . . Government' that the establishment clause prohibits."); *ACLU* v. *Rabun*, 678 F.2d 1379 (11th Cir. 1982) (striking large cross on state park property which aided one particular religion); *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980) (disallowing city sponsorship of platform for papal mass because it unconstitutionally aided Roman Catholic church); *ACLU* v. *Eckels*, No. H-82-0035 (S.D. Tex. May 22, 1984) (striking permanent crosses and Star of David in public park); *Goldstein* v. *Fire Department of the Village of Suffern*, 551 F. Supp. 1389, 1391 (S.D.N.Y. 1982) (striking sign posted on village-owned fire house as city aid supportive of theological message); *Lowe* v. *City of Eugene*, 254 Or. 518, 463 P.2d 360 (Or. 1969), *cert. denied*, 397 U.S. 1042 (1970) (holding donation of public land to permanent display of religious symbol constituted impermissible government aid).

As is evident in the caselaw there is a substantial benefit to religion at issue in this case. This is also conceded by respondents. After the controversy began over the Scarsdale creche, respondents both elected not to display the creche on private property, 575 F. Supp. at 1120, and rejected several offers from local churches to display their creche on a rotating basis on church properties. This offer was rejected chiefly because of their "desire that the creche speak an 'ecumenical' message, and the perception that this goal would best be achieved if the creche spoke from public land." 575 F. Supp. at 1120.

The role of Boniface Circle is clear, at least in respondents' minds. It converts an admittedly religious symbol (Creche Committee Complaint ¶ 18, Citizens' Group Complaint ¶ 16) to one that is "ecumenical" and endorsed by government — a substantial benefit. Yet, the Second Circuit miscasts the benefit as "incidental." Slip op. at 29. It compares the turning over of government park land for display of an unattended semi-permanent religious symbol to the access of a university forum by speakers, religious and non-religious alike. *Id.* In this respect, the

court errs. The governmental benefit accorded when a private speaker exercises his personal free speech communication rights in a public forum is different from that benefit accorded when a religious symbol is left unattended as a fixture on government land. *Compare O'Hair* v. *Andrus*, 613 F.2d 931, 934-935 (D.C.Cir. 1979) (upholding a mass conducted on public property) *with Gilfillan* v. *Philadelphia*, 637 F.2d 924 (1980) (striking city construction and display for two weeks of a platform for papal mass). As is discussed supra at 10; *infra* at 14-21, the benefit at issue herein concerns the use of government land, in the absence of any accompanying independent speaker, which presents the appearance of government endorsement of an unattended nativity scene display's religious message.

In discounting the nature of this benefit to the religious symbol herein, the court of appeals misapplies the *Lynch* decision. For the court holds that the aid characterized by this Court as *"de minimis"* in *Lynch* is greater than the government aid at issue in this case:

> If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the village's neutral accommodation herein to permit the display of the creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary effect prong of the *Lemon* test and, therefore, violative of the establishment clause.

Slip op. at 29.

The court's *a fortiori* argument misses the point. Notwithstanding the source of the Scarsdale creche's funding, deemed irrelevant by this Court in *Lynch* and in *Stone*, its display on government land confers a substantial benefit — one recognized in the caselaw and valued by respondents enough to eschew alternative non-governmental sites and litigate for the Circle.

The creche in Boniface Circle is just like the Ten Commandments struck by this Court in *Stone* v. *Graham*. Both are privately funded, yet both in their posting on government premises would

curry "the official support of Government" that the establishment clause prohibits. 449 U.S. at 42.

II

THE VILLAGE IS FREE TO EXCEED THIS COURT'S ESTABLISHMENT MANDATE PROVIDED AS IN THIS CASE THERE IS NO COUNTERVAILING CONSTITUTIONAL CONCERN.

1. Local governments have authority under ***Lynch*** *to deny sponsorship of religious symbol displays.*

The Village's action in refusing to turn over Boniface Circle to respondents for a nativity scene display was necessary to avoid violation of the establishment clause principles. Yet, if this Court were not to find it so required, the Village would still be free to make its own determination as to whether it wished to permit its land to be used for this purpose.

Pursuant to this Court's decision in *Lynch*, local governments have the authority to make their own determinations as to whether they wish to sponsor religious symbol displays. *Lynch* held that a a town could sponsor a creche in its holiday display without violating the establishment clause. It did not hold that a town must do so. In eschewing an establishment mandate barring government funding of religious symbols, *Lynch* confers authority upon local governments to make their own determinations regarding such sponsorship. Accordingly, under *Lynch*, a local government remains free to have a stricter view of the establishment mandate than the federal government; or it may have concerns regarding the political divisiveness of such sponsorship in its community, or its concerns may be economic in nature, *i.e.*, it may wish the funding to go for purposes other than nativity scenes, such as education, etc.

This local discretionary authority is created whenever this Court eschews an establishment mandate. As characterized by Justice White in *Widmar* v. *Vincent*, the parameters of this local

authority are formed by the nature of establishment clause analysis. The establishment clause "sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is required to do." 454 U.S. 263, 282 (1981)(dissenting op.)(emphasis added). "The step from the permissible to the necessary, however, is a long one." *Id.*

This local discretion pursuant to establishment clause analysis is defeated only by a countervailing constitutional concern. *See Widmar*, 454 U.S. at 275-276 (majority op.). Such countervailing concerns were deemed by this Court to be present in *Widmar* where this Court declared "the state interest... in achieving greater separation of church and state than is already insured under the establishment clause of the federal constitution, is limited by the free exercise clause and in this case by the free speech clause as well." *Id.* at 276-277.

No such countervailing constitutional interests are present here. As is shown *infra*, the free speech concerns present in *Widmar* which concerned access to a university forum by a religious student group are simply not at issue as to the unattended posting of a religious symbol on government park land. In the absence of a countervailing constitutional concern, therefore, the Village of Scarsdale retains its discretion to determine the proper extent of its sponsorship of private sectarian symbols.

III

THERE IS NO CONSTITUTIONAL RIGHT TO DISPLAY UNATTENDED RELIGIOUS SYMBOLS ON PUBLIC PROPERTY BECAUSE SUCH DISPLAY CREATES THE IMPERMISSIBLE APPEARANCE OF GOVERNMENT SUPPORT OF RELIGION IN CONTRAVENTION OF ESTABLISHMENT PRINCIPLES.

Scarsdale's right to deny permission to display the exclusively religious nativity scene herein is not defeated, as respondents urge, by alleged free speech rights to public property for display of the unattended nativity scene at issue. For even traditional public forums such as parks — open to religious and non-religious

uses — may be used in a way that causes public perception of government sponsorship of religion, in violation of establishment. The rights of private parties to sponsor unattended nativity scenes on government land are not, the Second Circuit's decision notwithstanding, concurrent with the rights of religious speakers in public parks because the display of unattended religious symbols on government premises, unlike their use by religious speakers, raises a presumption of government endorsement. Such an appearance of sponsorship is unconstitutional as to symbols which are religious. Here, this perception of government sponsorship as held by the district court below, is due to a variety of factors:the fact that the nativity scene would be left unattended for half a month on government property, the absence of any other surrounding symbols, and the recurring annual reservation for twenty four years of the park only for the religious nativity scene at issue herein.

What is sought in this case is the donation for half a month of Boniface Circle for religious purposes. At issue is a "right to construct and leave a religious symbol on government land." This right was rejected by the district court in this case. It found that where a citizen's religious expression takes the form of displaying unattended religious fixtures on government land, the message sought to be communicated to other citizens was not one of individual religious expression, but rather one of government endorsement of the religious message — impermissible under the establishment clause as to religious symbols.

> [W]hen a symbol is implanted on public land that land uniquely becomes the message bearer and because, concomitantly, there are no persons present to whom the receiver of the religious message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present.

575 F. Supp. at 1131.

Where religious symbols are posted unattended on government land, the district court held that there is an appearance of government support of the symbol. 575 F. Supp. at 1131. This presumption of state sponsorship is supported in the caselaw. This Court and district and appellate courts considering the constitutionality under establishment principles of privately sponsored religious symbols posted on public property have found that, private funding notwithstanding, the posting of such symbols on government property is violative of establishment concerns and creates a statement by government in support of religion. In *Stone* v. *Graham*, 449 U.S. 39 (1980)(*per curiam*) (striking posting of privately sponsored Ten Commandments on public school walls), the Court considered a privately sponsored religious symbol posted on public property. There it held that "[i]t does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislation provides the 'official support of the . . . Government' that the establishment clause prohibits." *Stone*, 449 U.S. at 42. Similarly, in *McCollum* v. *Bd. of Educ.*, 333 U.S. 203 (1948)(barring outside privately sponsored religious groups from use of public school premises), the Court found that public property was being impermissibly used to aid private religious groups in spreading their faith. *Id.* at 210.

The conversion of a private religious message to that of the state was noted by the district court in *ACLU* v. *Eckels* , No. H-82-0035 (S.D. Tex. May 22, 1984), *appeal filed*, No. 84-2152 (6th Cir. July 5, 1984)(striking privately sponsored permanent crosses and Star of David in public park): "These permanent symbols become state symbols when placed in a public park, and they carry purely religious messages." Slip op. at 30. And, in *Lowe* v. *City of Eugene*, 254 Or. 518, 463 P.2d 360 (Or., 1969) 397 U.S. 1042 (1970), *cert. denied*, 397 U.S. 1042 (1970), in considering the constitutionality of a cross on city park property the court of appeals held that turning the use of public land over

to the permanent display of a religious symbol constituted impermissible government sponsorship. *See* 254 Or. 518, 463 P.2d 316, 363.

> While government...can act to protect the individual's right to his own personal expressions of religious opinion, the government has no business placing its power, prestige or property at the disposal of private property or groups.

Id., citing approvingly to *McCollum* v. *Bd. of Educ.*, 333 U.S. 203 (1948).[7] Central to these decisions finding an unconstitutional establishment of religion is that government, in turning over public land to private citizens for the display of religious symbols, is itself sending a message supportive of religion.

The government endorsement, held by the district court to be present where a nativity scene would be left unattended for two weeks on government land, was found not to be rebutted in any

7. These cases finding unconstitutional government sponsorship despite the privately funded nature of the religious symbols track those decisions disallowing religious symbols which have been publicly sponsored. In *ACLU* v. *Rabun*, 678 F.2d 1379 (striking large cross on state park property), the court found "when a government permits religious symbols to be constructed on public property," the government has the burden of justifying its engaging in activities which "may appear to endorse the beliefs of a particular religion." 678 F.2d at 1390. Similarly in *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980) (disallowing city sponsorship of platform for papal mass), the Court of Appeals for the Third Circuit considered that the display of a papal mass platform for more than a week was the creation by the city of a "temporary shrine." 637 F.2d at 931. This creation of a temporary shrine, more temporary than the nativity scene at issue herein, constituted government endorsement of religious speech. According to the court the erection of the platform allowed the Pope to bring a "religious message with the help of the city from the Roman Catholic Church to millions of persons." *Id.* Most recently, in applying the *Lynch* decision to hold unconstitutional a nativity scene standing alone on city hall premises, the district court in *ACLU* v. *Birmingham*, No. 83-CV-3348-DT (E.D. Mich. July 23, 1984), *appeal pending*, No. 84-1637 (6th Cir. 1984) noted: "This is the presentation of the creche alone, which is the message that this is a Christian city." Slip op. at 6. Similarly, in *Goldstein* v. *Fire Department of the Village of Suffern*, 551 F. Supp. 1389 (S.D.N.Y. 1982), a sign bearing the message "Keep Christ in Christmas," and posted on a village owned fire house, was found by the district court to give the appearance that the defendants were making a statement supportive of the theological origins of Christmas. *See* 559 F. Supp. at 1391.

way in this case. The district court found that the semi-permanent unattended posting of the scene in the park, together with the fact that the only recurring reservation by private citizens of the park for a symbol display was that of the nativity scene herein, cemented the connection between Scarsdale and the private creche. 575 F. Supp. at 1124, 1131, 1132.[8]

Moreover, this appearance of government sponsorship of religion exists notwithstanding the disclaimer provided by the Creche Committee. As the district court found, no matter what size the disclaimer, "it is doubtful that a sign saying that a symbol had been 'erected and maintained' by a private group will entirely eliminate the appearance of state support when public land is still the one visible thing to which the speech may be attributed." 575 F. Supp. at 1132-1133.

That the appearance of a government message endorsing religion is precisely what is sought by respondents here is evident by their rejection of private property for display of the creche. For six years, despite many offers of alternative sites, the Creche Committee has sought public property with its "ecumenical" government message. *Id.* at 1120, 1131. "[C]ultivating an aura of Village approval" of the creche was, the district court held, "one of the factors fueling plaintiffs' desire to have the creche on public property."*Id.* at 1131.

Despite this government endorsement sought by the respondents and found by the district court in this case, the court of appeals below would grant a right of access for the unattended nativity scene here on this Court's decision in *Widmar* allowing access to a university forum for religious speakers. Slip op. at 29.

Yet there are numerous fundamental differences between the rights of religious speakers exercising their individual free speech rights and the rights claimed by the citizens herein to post an unattended religious fixture on village land. In upholding the

8. While Boniface Circle might have been hypothetically "available" to other symbols over the years as claimed by the Second Circuit, slip op. at 29, it was not so used. 575 F. Supp. at 1132. Further as to use of the park by other symbols concurrent with the nativity scene here, the small size of the Circle would make such use prohibitive, notwithstanding the court of appeals' *dicta* on "availability." Slip op. at 29.

right of religious student groups to use a university classroom in *Widmar*, 102 S. Ct. 269 (1981), this Court emphasized a pre-existing use of the university forum by more than 100 other speakers — religious and not religious. Because of this diversity of speakers, this Court found that there would be no appearance of sponsorship or government endorsement of religion. 102 S. Ct. at 277. In the absence of this government sponsorship, the use of the university forum by religious student groups was deemed by the Court to be "an incidental" benefit to religion, 102 S. Ct. at 276, and and individual religious free speech rights were dispositive. Similar to *Widmar* are the many cases upholding the rights of religious speakers to speak in parks or streets. *See, e.g., Niemotko* v. *State of Maryland*, 340 U.S. 268 (1951) (upholding bible discussions in public park); *Saia* v. *New York*, 334 U.S. 558 (1948) (permitting religious lectures through loud speakers in park); *Fowler* v. *State of Rhode Island*, 345 U.S. 67 (1943) (upholding use of public park for religious exercises); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) (upholding right of religious groups to hold street parade); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (upholding distribution of religious literature). *See Heffron* v. *ISKCON*, ___U.S.___, 101 S. Ct. 2559 (1981) (upholding religious solicitation in public fair).

Unlike *Widmar* and the above cases where there are transient speakers and a great diversity of individual expression which vitiate the appearance of government expression about religion, here the nativity scene is unattended by any individual speaker, thus its posting on government land bespeaks government support. Compounding this effect are a number of factors: The nativity scene here would be posted unattended in the park for about half a month. This continuous and lengthy use of government property the district court found to be like the impermissible permanent donation of government land for religious expression. *See* 575 F. Supp. at 1128, 1129 n.17. *Cf. Tilton* v. *Richardson*, 403 U.S. 672 (1971). Further unlike *Widmar* with its broad array of religious and non-religious speakers, mitigating the religious use of the university forum, in Boniface Circle there is no

mitigating array of diverse symbols. Historically, the nativity scene has been the only symbol with a recurring reservation in the park. 575 F. Supp. at 1124, 1132. And, concurrent with the nativity scene there are no other private symbols posted on Boniface Circle. While the Second Circuit dwelled on the hypothetical "availability" of the park for other symbols, slip op. at 29, the inquiry under *Widmar* is whether prior to the religious use of a forum there has been broad access to the forum by an array of expression, religious and non-religious. *See Widmar*, 454 U.S. at 274 & n. 13. Even if the inquiry were in the hypothetical, it is dubious that given the size of Boniface Circle, there is a hypothetical "availability" concurrent with the nativity scene for an array of diverse symbols or first amendment communication among symbols.

The instant nativity scene affixed alone for half a month on government property sends such a strong message of government support that the district court found that any disclaimer regarding its private origins could not "cure" the impermissible endorsement herein. *See* 575 F. Supp. at 1132-1133.

This unrebutted appearance of government sponsorship triggered by the nativity scene displayed on Boniface Circle vitiates any possible claims to individual religious free speech rights here.[9]

9. Similar to the presumption of government speech supportive of religion where religious symbols are erected and left on government property, is the presumption in the public schools. Religious exercises in the public school forum trigger a presumption of government endorsement. In public schools this has been attributed to the schools not being open forums but rather government controlled. *See McCollum* v. *Bd. of Educ.*, 333 U.S. 203, 212-213 (1948)(government buildings and attendance laws aid religion). Accordingly, where this government endorsement of a religious message has been found, this finding has impeded a similar finding of student religious speech rights to school sponsorship of prayer. For the courts have found that where there is government sponsorship of religion it is the government which appears to be speaking. *See Lubbock Civil Liberties Union* v. *Lubbock Indep. School Dist.*, 669 F. 2d 1038, 1048 (5th Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 800 (1983); *Brandon* v. *Bd. of Educ.*, 635 F.2d 971, 977 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Stein* v. *Oshinsky*, 348 F.2d 999 (1965); *Hunt* v. *Board of Educ.*, 321 F. Supp. 1263, 1266-67 (S.D. W. Va. 1971); *Johnson* v. *Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, —, 127 Cal. Rptr. 43, 52-53, *cert. denied*, 434 U.S. 877 (1977); *Trietley* v. *Board of Educ.*, 65 A.D.2d 1, —, 409 N.Y.S.2d 912, 916-17 (1978).

The presence of the impermissible government message supportive of religion overwhelms any individual religious message and is in fact the reason for the establishment prohibition. *See Engel*, 330 U.S. at 429. *Compare Gilfillan* v. *Philadelphia*, 637 F.2d 924 (1980) (striking as impermissible the erection and display for two weeks by a city for a Papal mass) *with O'Hair* v. *Andrus*, 613 F.2d 931, 934-935 (D.C. Cir. 1979) (upholding Papal mass). Where as here the form of requested religious expression inevitably implicates government endorsement — impermissible as to religious symbols under the first amendment establishment clause — as the district court held, it is not protected expression. For the rights of religious speakers to air their views are not at issue in this case. Here, the respondents do not wish to have access to the park to exercise their own individual religious speech rights.[10] Instead, the group wishes, through the display of an unattended religious fixture on government land, to have government speak for them. This, as the district court held, they may not do. As noted by the New York Court of Appeals in *Trietley* v. *Bd. of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978), "[p]etitioners are free to pursue their religious beliefs; they are only prevented from enlisting...[government] aid to do so." 409 N.Y.S.2d 912, 917. *See Engel* v. *Vitale*, 370 U.S. 421, 435.

10. Such protected expression presumably would include speakers gathering in Boniface Circle bearing their own creche and the unattended display of the creche on private or church property. *See McCreary* v. *Stone*, 575 F. Supp. at 1131 n. 20. In Scarsdale, these forms of protected expression are already in use, with many homes and churches displaying nativity scenes on their property. *Id.* at 1121, 1131 n.20.

IV

PRESENCE OF NATIVITY SCENE, A RELIGIOUS SYMBOL, FOR TWO WEEKS ON PUBLIC PARK PROPERTY IMPEDES RIGHTS OF SCARSDALE CITIZENS TO USE PARK FREE OF SECTARIAN RELIGIOUS INFLUENCE

Boniface Circle is a park with public access. It consists of 3,255 square feet, is oval in shape, largely grass covered and lies in the heart of the retail business district of Scarsdale. 575 F. Supp. at 1115. The park, according to findings by the court below, is "visited year round by persons of 'all stripes,' ... for what appear to be varying reasons, among them as a way-through for pedestrians from one street in the business district to another." *Id.*

This access to the public park, as found by the lower court, by persons of all "stripes," for "varying reasons," including necessary pedestrian traffic, would be prohibited if the village were to allow the erection of a religious symbol for half a month on park property. Unlike the transient nature of a religious speaker on a public forum, *cf. O'Hair* v. *Andrus*, 613 F.2d 931 (C.A. D.C. 1979) (upholding Papal mass on government mall), the permanence of a nativity scene on the public park for half a month, imbues the park with Christian symbolism and simultaneously deprives others of their right to use the park as they wish, without the pervasive presence of the creche. *See* this brief, *supra* at 15, 18-20.

This was the holding in *ACLU* v. *Rabun County Chamber of Commerce*, 678 F.2d 1379, in considering, for standing purposes, a plaintiff's injury in being deprived of access to secular public land. In *ACLU* v. *Rabun*, a cross was situated on public land to which "all residents of Georgia have a right of access." 678 F.2d at 1384. This right of access to the public park, the Eleventh Circuit found, was impaired "as a consequence" of the presence of the cross on the public park. 678 F.2d at 1388. The presence of the cross had a "physical and metaphysical impact" which legitimately caused plaintiffs to be unwilling to use the park. Recognized was the deprivation inherent in plaintiffs either having to choose other parks or "hav[ing] their right to use Black Rock

Mountain State Park conditioned upon the acceptance of unwanted religious symbolism." 678 F.2d at 1389.

Similarly, in *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970), the Court of Appeals for the D.C. Circuit considered the constitutionality of an illuminated creche in a Christmas pageant on federal park land. In determining the nature of appellants' injury the court held "citizens may sue to enjoin a government holding land in trust as a park from impermissibly diverting the use so as to destroy their beneficial interests as park users. They likewise have standing to complain when the park lands are impermissibly devoted to uses that contravene the Establishment Clause." *Id.* at 947.

Like the plaintiffs in *ACLU* v. *Rabun*, and in *Allen* v. *Hickel*, here too the citizens of Scarsdale have rights to use their public park, rights which may not be encumbered with "a forced acceptance of unwanted religious symbolism." *ACLU* v. *Rabun*, 678 F.2d at 1389. This right is barred here by the presence of the nativity scene, an intrinsically religious symbol, posted on Boniface Circle, public park land, for half a month. For the citizenry of Scarsdale, of diverse and pluralistic religious faiths,[11] turning the park over to this Christian symbol deprives them of their right to enjoy the park free of sectarian religious influence.

11. According to the court below, "the record in varying places suggests that the community of Scarsdale includes adherence of Christian, Jewish and several 'Eastern' religious faiths. The village also has a Mormon Church and followers of the Bahai Faith and several newer religions such as that of the Reverend Moon." 575 F. Supp. at 1115 n.2.

CONCLUSION

The display on government land of the concededly sectarian religious nativity scene herein constitutes a conversion of public property to religious use. This government support of religion has not hitherto been deemed permissible by this Court. For the reasons set forth above, *amici* respectfully submit that the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

Birmingham Jewish Community Council
Greater Phoenix Jewish Federation
Tucson Anti-Defamation—Community Relations Committee of the Jewish Community Council
Greater Long Beach and West Orange County Jewish Community Federation
Los Angeles Community Relations Committee of Jewish Federation-Council
Oakland Greater East Bay Jewish Community Relations Council
Orange County Jewish Federation
Sacramento Jewish Community Relations Council
San Diego Community Relations Committee of United Jewish Federation
San Francisco Jewish Community Relations Council
Greater San Jose Jewish Community Relations Council
Greater Bridgeport Jewish Federation
Greater Danbury Community Relations Committee of Jewish Federation
Greater Hartford Community Relations Committee of Jewish Federation
New Haven Jewish Federation
Eastern Connecticut Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
Jewish Community Relations Council of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington Jewish Community Council
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Community Council
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation

Sarasota Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council
Metropolitan Chicago Public Affairs Committee of Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis Jewish Community Relations Council
South Bend Jewish Federation of St. Joseph Valley
Jewish Community Relations Council of Indiana
Greater Des Moines Jewish Federation
Louisville Jewish Community Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation—Community Council
Baltimore Jewish Community Relations Council
Metropolitan Boston Jewish Community Council
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit Jewish Community Council
Flint Jewish Federation
Minneapolis Minnesota and Dakotas Jewish Community Relations Council—Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis Jewish Community Relations Council
Omaha Jewish Community Relations Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Bergen County Jewish Community Relations Council of United Jewish Community
Cherry Hill Jewish Community Relations Council of Southern New Jersey Jewish Federation
Delaware Valley Jewish Federation

East Orange Metropolitan New Jersey Jewish Community Federation
Northern Middlesex County Jewish Federation
Raritan Valley Jewish Federation
Union Central New Jersey Jewish Federation
Wayne North Jersey Jewish Federation
Albuquerque Jewish Community Council
Greater Albany Jewish Federation
Binghamton Jewish Federation of Broome County
Brooklyn Jewish Community Council
Greater Buffalo Jewish Federation
Elmira Community Relations Committee of Jewish Welfare Fund
Greater Kingston Jewish Federation
New York Jewish Community Relations Council
Rochester Jewish Community Federation
Greater Schenectady Jewish Federation
Syracuse Jewish Federation
Utica Jewish Community Council
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati Jewish Community Relations Council
Cleveland Jewish Community Federation
Columbus Community Relations Committee of Jewish Federation
Greater Dayton Community Relations Committee of Jewish Federation
Toledo Community Relations Committee of Jewish Welfare Federation
Youngstown Jewish Community Relations Council of Jewish Federation
Oklahoma City Jewish Community Council
Tulsa Jewish Community Council
Portland Jewish Federation
Allentown Community Relations Committee of Jewish Federation

Erie Jewish Community Council
Greater Philadelphia Jewish Community Relations Council
Pittsburgh Community Relations Committee of United Jewish Federation
Scranton-Lackawanna Jewish Council
Greater Wilkes-Barre Jewish Federation
Providence Community Relations Committee of Rhode Island Jewish Federation
Charleston Jewish Community Relations Committee
Columbia Community Relations Committee of Jewish Welfare Federation
Memphis Jewish Community Relations Council
Nashville and Middle Tennessee Jewish Federation
Austin Jewish Community Council
Greater Dallas Jewish Community Relations Council of Jewish Federation
El Paso Jewish Community Relations Committee
Greater Houston Jewish Federation
Fort Worth Jewish Federation
San Antonio Jewish Community Relations Council of Jewish Federation
Newport News-Hampton Jewish Federation
Richmond Jewish Community Federation
Tidewater United Jewish Federation
Greater Seattle Jewish Federation
Madison Jewish Community Council
Milwaukee Jewish Council

No. 84-277

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ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—v.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DESOUSA

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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60pp

QUESTIONS PRESENTED

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court held that the University of Missouri had violated the Free Speech Clause when, on the stated basis of the Establishment Clause, it denied use of university facilities ("a forum generally open for use by student groups") to students desiring use of those facilities for religious worship and religious discussion. *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984), held that the City of Pawtucket, Rhode Island, had not violated the Establishment Clause of the First Amendment when it included a crèche in a display on private land that also contained a Santa Claus house, a Christmas tree and other figures and decorations. The questions presented by this case are:

(1) Whether a municipal governing board, having refused to allow a crèche to be placed in a small public park, should be compelled under the rule of *Widmar* v. *Vincent* to allow placement of the crèche in the park for the approximately two weeks of the Christmas season.

(2) Whether *Lynch* v. *Donnelly* shows that the board would not violate the Establishment Clause if it authorized placement of the crèche in the park.

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THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–25a) is reported at 739 F.2d 716. The opinion of the District Court (Pet. App. 26a–61a) is reported at 575 F. Supp. 1112.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1984. The petition for a writ of certiorari was filed on

August 17, 1984, and was granted on October 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, applicable to the States under the Fourteenth Amendment, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . . .

STATEMENT OF THE CASE

1. The Facts

The facts of the case were presented in a detailed stipulation, accompanying exhibits, answers to interrogatories and deposition testimony. They may be summarized as follows:

Boniface Circle is a plot of land in the center of Scarsdale's business district. Its area is about .075 acres. Deeded to the Village as a park in 1931, its surface is mainly grass. It contains a war memorial erected in 1949, a flagpole, an evergreen tree, dense hedges, two benches, two lampposts and a walkway (J.A. 46).[1]

Over the years, almost no physical signs, symbols or other objects have been displayed in Boniface Circle. For several hours one afternoon in 1961, the Community Fund was permitted to launch its drive by placing a model rocketship there, but was directed to remove that symbol to another public place for the rest of the eight-day drive (J.A. 62). A Scarsdale High School group held a one-day bake sale and art show there in 1971 (J.A. 60). During several Christmas seasons, Christmas lights have been placed by the Chamber of Commerce on

1 "J.A." refers to the Joint Appendix, "Pet. App." to the Appendix to the Petition for a Writ of Certiorari, "J. Ex." to the Exhibit Volume to the Court of Appeals Appendix, and "Stip. Ex." to exhibits included in the stipulated materials in the District Court record.

utility poles throughout the Village, including the two Boniface Circle lampposts (J.A. 50–51). In 1982, the evergreen tree in Boniface Circle was similarly decorated (J.A. 53); in prior years the Board allowed private groups to decorate Christmas trees on other Village-owned property (J.A. 53–54).

Elsewhere on Scarsdale public lands, in addition to Christmas lights and ornaments, permission has been given to emplace such standard objects and symbols as those of the American Red Cross, the Community Fund rocketship (for eight days), tables and easels for one-day bake sales, carnivals or art sales, United Fund signs, Cancer Committee swords, Boy and Girl Scout model campsites, and some similarly familiar things (J.A. 58–64). With the exception of the crèche involved herein, none of these physical symbols appears from the record to have been a controversial matter.

In October 1957 the Scarsdale Board granted a request by the Scarsdale Creche Committee for permission to place a crèche, or Nativity scene, in Boniface Circle, to express "the real significance of Christmas time" (J.A. 70). Thereafter, similar requests were granted in each year from 1958 through 1980 to have the Nativity scene on the Circle for about two weeks (J.A. 33–34). With the trivial exception of electricity for a light bulb in some past years, the cost of the crèche and its display has been borne entirely by the Creche Committee (J.A. 36).

At various times public places and facilities have been made available in Scarsdale for people conducting religious services and demonstrations (as distinguished from symbols like the crèche resting on public land for periods of days or weeks). These have included Christmas carol sings, at which invocations and benedictions have been offered (J.A. 51–52, 54), Memorial Day prayers at Boniface Circle (J.A. 54), patriotic Independence Day speeches (J.A. 54), religious services by groups of various faiths in Village-owned buildings called Wayside Cottage (J.A. 54–56) and the Crossway Firehouse (J.A. 61), and interfaith vigils and demonstrations in various public parks and streets (J.A. 54–55, 64), as well as church picnics and block parties (J.A. 58). A room in the public

library has been used by religious and other groups for speeches, seminars and the display of various articles, some with religious significance (J.A. 56–58). It does not appear that any of these "live" ceremonies or meetings has drawn objection from anyone in the Village.

Almost from the beginning, however, the placement of the crèche at Boniface Circle each Christmas season has evoked protests—sporadic at first, but increasing over time, so that the crèche has been a "hotly contested" issue in Scarsdale in recent years (Pet. App. 30a; J.A. 38–42, 44–45). The controversy, recounted in detail by the District Court (Pet. App. 30a–38a), began with protests by Jewish organizations in 1960 and 1963 (J.A. 38). These objectants deplored "the injection of religious matters in public affairs" (J.A. 74–75) and asserted, *inter alia*, that "many members of the Jewish community believe that their feelings . . . have been disregarded. . . . [in] an area involving a great deal of emotion" (J.A. 85). The Board of Trustees, among its other responses to the problem, in 1961 created a Special Committee to study it, later enlisted a professor of human relations as a consultant, and, in the late 1970s, solicited the views of the Scarsdale Human Relations Advisory Council (J.A. 38, 40). The Advisory Council, in the years 1976–1982, recommended that the crèche be permitted, but urged toward the end of the period that the Creche Committee should preferably use nonpublic property as its site (J.A. 40). The Trustees similarly, in the years 1979 and 1980, granted the request but (in 1979) "strongly recommended . . . that the Creche Committee consider rotating the creche among various Village churches [which had offered their property for the purpose] in future years" (J.A. 40, 39) and (in 1980) "strongly urge[d] that next year the Committee erect the creche at a location other than Village-owned property" (J.A. 40).

The objections to the crèche over the years came from both Christian and nonChristian residents. As the parties stipulated (J.A. 44):

> Some residents of Scarsdale who are not of the Christian faith are offended by display of the creche on public property because they believe it to favor the Christian religion and to be offensive and hostile to their different beliefs or non-beliefs. Some residents, both Christian and non-Christian, object to the creche because they perceive the placement of this symbol on public property as giving government sanction to, or support and endorsement of, the religious beliefs thus symbolized. Some, both Christian and non-Christian, object because they perceive the creche on public property as mingling government and religion in objectionable fashion.

Other residents, as was also stipulated (J.A. 44–45), supported the crèche and were offended when in 1981 and 1982 the applications to place it in Boniface Circle were denied:

> Some residents of the Village are offended that the Village has denied permission for the erection of the creche at Boniface Circle. Some of those residents view the display of the creche at Boniface Circle as a long standing tradition signifying dedication to peace and goodwill among men and women everywhere. Others view the creche as a symbol of the religious aspects of Christmas. Some residents view the Village's denial of permission to erect the creche as a denial of their right to express or receive a Christmas message or as an official rejection of the message which the creche brings to them.

As the level of controversy rose, it led to a lawsuit in 1976 to enjoin the allowance of a crèche on Boniface Circle, ending in a dismissal on a jurisdictional ground that has since become invalid (J.A. 39).[2] Also in 1976, and for the succeeding four

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2 *Rubin* v. *Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1977). The dismissal as against the Village was ordered on the basis of *Monroe* v. *Pape*, 365 U.S. 167 (1961), since overruled in *Monell* v. *Department of Social Servs.*, 436 U.S. 658 (1978).

years, the Creche Committee was required to display a sign beside the crèche, saying "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." No dimensions were specified (J.A. 36–37). The sign used in compliance was visible only from short distances (Pet. App. 34a), a condition later deemed by the Court of Appeals to need correction (*id.* at 22a).

1976 was also the year when, as noted above, five churches offered their grounds on a rotating basis as sites for the crèche to avoid the conflict over use of the public site (J.A. 39). Explaining their position, the ten clergymen making the offer issued a statement that said in part (J. Ex. 157):

> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.

Other Christian clergymen took an opposite stance, supporting the display of the crèche on public land and later decrying the decision not to permit it (Pet. App. 33a; J.A. 39).

While permission for placing the Nativity scene on Boniface Circle continued to be granted through 1980, the unanimity of the Trustees on this subject ended in 1973, when one member abstained. The same member abstained in the following year (another being noted as absent). In 1975, there was a repeat of the abstention, while another member voted "Nay." In 1976, there was a "Nay" vote again and two members noted as absent. The "Nays" increased to two in 1978, three in 1980 and a majority of four in 1981 and 1982 (J.A. 34–36).

As reflected in the votes of the Trustees, the crèche became a political issue. Candidates seeking election declared their positions on the subject (J.A. 65–66). Voters, including a

plaintiff-deponent herein, deemed this a material question in considering how to cast their ballots (J. Ex. 191–92; J.A. 293).

Following denial of permission to display the crèche on Boniface Circle in 1981, there was "a small uproar [in the community] . . . which was refueled the following year when the board again voted to prohibit the creche" (Pet. App. 34a). Mayor Jean Stone, whose deciding vote defeated the application, received a large volume of mail pro and con. Much of the mail posed the issue as one of Christian versus Jew (Pet. App. 34a–35a; J.A. 296–99). Writers in this category appeared to assume, incorrectly, that the Mayor was Jewish (Pet. App. 34a; J.A. 296); a portion of her mail was "blatantly antisemitic" (Pet. App. 35a; J.A. 296).

In November 1981, after permission had been refused, the Creche Committee accepted an offer from a restaurant across the street from Boniface Circle and erected the crèche there on December 17, 1981 (J.A. 41, 43). After the 1982 denial the same offer was made, and some church properties were also made available. These offers were refused (J.A. 42–43).

Explaining the reasons for refusing the church locations, the chairperson of the Creche Committee mentioned that some of the properties offered were not centrally located, some presented topographical problems, and some already had crèches. The "first" and "preeminent" reason for this refusal was, however, that this "would destroy the ecumenical aspect of the Creche Committee" (Pet. App. 37a; J.A. 275). This reflected, as the District Court found, "that a dominant reason why the Creche Committee has wanted the creche at Boniface Circle is because Boniface Circle is *public* land" (Pet. App. 38a; emphasis in original).

The denial of the Creche Committee's request for 1982 was voted (4–3) at a special meeting of the Trustees on December 1, 1982 (J.A. 155–59). Thereafter, on December 7, 1982, a new group of individuals, which came to be known as the Citizens Group, filed an application to place a small crèche on Boniface Circle between December 19 and 26, 1982, stating that this "private personal property . . . should not be con-

fused with the Creche owned by the Creche Committee'' (J.A. 171). Again by a 4–3 vote, this application was denied on December 14, 1982 (J.A. 37).

The minutes of the Scarsdale Board reflect at least two concerns animating those who voted against allowing the crèche on Boniface Circle: (1) the belief, as expressed by clergymen and others, that the Village land should not be used in this way when the symbol thus sited gave offense to substantial numbers of Scarsdale residents, both Christian and nonChristian (J.A. 136–37, 143-44, 146; Stip. Ex. 54); and (2) the essentially legal position that the display over a period of some two weeks would contravene the Establishment Clause (J.A. 145; Stip. Ex. 54).

On February 7, 1983, the Citizens Group, which had never displayed its crèche (Pet. App. 38a), brought the first of the two actions consolidated herein, seeking, along with other relief, an injunction to compel permission for placement of its crèche on Boniface Circle (J.A. 2, 3–10). Recalling the purposes of its application to the Village Board, the Group recited ''desires to join in the Village's celebration of 'Christmas' by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions'' (J.A. 8). The Creche Committee filed its complaint on April 28, 1983 (J.A. 2, 16–24).

2. The Decision of the District Court

Having seen that crèches are displayed in Scarsdale outside homes and churches (Pet. App. 38a), the District Court began its analysis by rejecting the argument of the Citizens Group that denial of permission for its Nativity scene on Boniface Circle violated the Free Exercise Clause (*id.* at 39a).[3] The Court found ''solidly implicated'' (*id.* at 39a–40a), however, the plaintiffs' claimed rights under the Free Speech Clause.

Turning to that, the District Court first found that Boniface Circle is ''a traditional public forum'' (*id.* at 42a), and that the

3 The argument, eschewed by the Creche Committee, was abandoned by the Citizens Group as well in the Court of Appeals.

denial of the crèche applications was ''content-based'' (*id.* at 46a). This brought into issue Scarsdale's contention that the denials were justified by a ''compelling state interest''—namely, that allowance of the crèche would offend against the Establishment Clause (*id.* at 47a).

Dealing with this argument, Judge Stewart noted at the outset the undisputed proposition that the Nativity scene is a religious symbol (*id.* at 48a). He proceeded then to consider *Widmar* v. *Vincent*, 454 U.S. 263 (1981), upon which plaintiffs placed main reliance. Tracking *Widmar*, he pursued the three-pronged analysis of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971) (Pet. App. 50a). He observed in this connection (*id.*) this Court's caution that *Widmar* was to be understood as limited to the particulars of that case, the ''basis for [that] decision'' being a ''narrow'' one. 454 U.S. at 273, 277.

In that light, the District Court found the first prong of the *Lemon* analysis—the existence of a valid secular purpose—satisfied in plaintiffs' favor under *Widmar* (Pet. App. 51a). As to the concern for ''government entanglement,'' the Judge found the problem ''more complex,'' but concluded that there could not be a finding of Establishment Clause violation ''on this ground alone'' (*id.* at 51a–52a). The decisive factor amounting to such a violation, he held, was the finding that the two-week sojourn of the crèche on Boniface Circle had a ''primary effect'' that advances religion (*id.* at 53a).

On this key point, the District Court stressed that religious speakers on the Circle—a rally, a sermon, leafletting—would clearly ''run free and clear of the Establishment Clause'' (*id.* at 53a). Distinguishing the placement of an unattended symbol from the personal, oral speech in *Widmar*, however, he found that

> when a symbol is placed on public land the land performs an added and enhanced *function*. No longer is the land just a place from which a message can be proclaimed; when a symbol is left on public land the land actually becomes the message bearer. [*Id.* at 55a; emphasis in original.]

In determining the effect of a religious symbol "erected and left on public property" (*id.* at 56a), the District Court relied upon this Court's decisions emphasizing the danger of the "appearance" of state sponsorship of religious beliefs or joinder in religious activities (*id.* at 54a–55a). It found the danger realized in this case (*id.* at 56a–58a; emphasis in original):

> The record suggests that, in contrast to public gathering uses, people have objected to the creche precisely because an aura of Village approval has adhered to it. Removing this aura of Village approval was the primary concern of the members of Scarsdale's clergy who offered their church properties on an annually rotating basis for display of the creche.
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> Indeed, cultivating an aura of Village approval is, in our view, one of the factors fueling plaintiffs' desire to have the creche on public property. . . . The Creche Committee has conceded . . . [its] desire to enhance the creche's merely religious message with an "ecumenical aspect.". . . Imbuing the creche with an ecumenical appearance . . . would seem to occur *only* if Village land—the property of "all the people"—is in fact linked in the receiver's mind with the message, since there is nothing inherently ecumenical about the creche standing alone. . . . In contrast to *Widmar*, not only does there appear to be an "imprimatur of State approval" when the creche sits at Boniface Circle; plaintiffs actually seek it.

The District Court went on to observe that "[t]he advancement problems are not cured by the placement of a sign next to the creche" (*id.* at 59a), referring, *inter alia*, to *Stone* v. *Graham*, 449 U.S. 39 (1980).

It concluded that the Village was justified in denying both crèche applications "in order to avoid contravening the Establishment Clause" (Pet. App. 60a).

3. The Decision of the Court of Appeals

After the decision of the District Court, while plaintiffs' appeals were pending, this Court decided *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984). "Based upon the controlling precedents of *Lynch* and *Widmar*" (Pet. App. 2a), the Court of Appeals reversed and ordered a remand.

The Court of Appeals agreed with a number of the District Court's findings and conclusions: that the case involves a "public forum," that the Scarsdale Board's decisions were "content-based," that the Nativity scene is "a form of speech" and that the three-pronged analysis of *Lemon* v. *Kurtzman* was appropriate for this case. The appellate decision also joined in Judge Stewart's views on two of the three prongs, agreeing that the "secular purpose" factor is satisfied under *Widmar* and concluding, somewhat more strongly after *Lynch*, that the circumstances did not disclose the kind of "entanglement with religion" (including "potential political divisiveness") comprising an Establishment Clause violation.

The decisive point of disagreement was the Court of Appeals' conclusion that allowing the Nativity scene at Boniface Circle would not "have the direct and immediate effect of advancing religion" (Pet. App. 18a). Reviewing a series of this Court's decisions rejecting attacks on state action under the Establishment Clause (*id.* at 18a–19a), the Court of Appeals applied here the conclusion in *Lynch* that while there would be an advancement effect, it would be "indirect, remote or incidental" (*id.* at 19a). Referring to both *Lynch* and *Widmar* in this appraisal, the opinion says the result favoring the present plaintiffs follows *a fortiori* (*id.*):

> [T]he city involved in *Lynch* purchased, erected, displayed, sponsored and owned the creche therein. If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the Village's neutral accommodation herein to permit the display of a creche in a

traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause.

As to the question of appearance of public endorsement, the Court of Appeals again found the District Court refuted by *Lynch* and *Widmar* (Pet. App. 19a–20a):

> [T]he *Lynch* Court indicated that any perception that Pawtucket had aligned itself with the Christian faith by including the creche in its display was not a primary advancement of religion because the benefits conferred in such a situation are indirect, remote or incidental. *Id.* Moreover, *Widmar* stated that "an open forum . . . does not confer any imprimatur of State approval on religious sects or practices." 454 U.S. at 274. Under these principles, the Village's actions in permitting access to Boniface Circle for display of a creche—the same actions that would be necessary in permitting access for any display—do "not lead it into such an intimate relationship with religious authority that it appears . . . to be sponsoring . . . that authority." *Roemer*, 426 U.S. at 747–48 (footnote omitted).

The Court of Appeals, while caused "to hesitate" over this (Pet. App. 20a), found the record inadequate to ground a distinction from *Widmar* on the exposure of children (rather than university students alone) to the Scarsdale crèche. It also disagreed with the District Court's deprecation of the disclaimer sign, holding, however, that the comparatively inconspicuous sign involved here should be dealt with on remand by "an order concerning the size, visibility and message of an appropriate disclaimer sign or signs" (*id.* at 22a). Further, the Court dismissed Scarsdale's argument that *Lynch* was distinguishable on the grounds, among others, that the Pawtucket crèche had been emplaced among a variety of nonreligious objects and symbols, and was rested on private rather than public land (*id.*).

The Court of Appeals did not treat two factors deemed central by the District Court: (1) the difference in this context between live speakers or demonstrators and a controversial symbol standing alone in a public place for a period of about two weeks; and (2) the plaintiffs' insistence upon the public site as a means of achieving the "ecumenical aspect" of the crèche.

SUMMARY OF ARGUMENT

I. The Court of Appeals treated signs and symbols left for days or weeks on public land as no different under *Widmar* v. *Vincent*, 454 U.S. 263 (1981), than live speakers or leafleteers. This remarkable stretching of the Free Speech Clause would compel municipalities to make places in parks and other "public forums" not only for religious symbols, but for things like swastikas and vulgar signs containing words or thoughts that speakers have a right to utter in such settings. The result would make cherished local places, thus far reserved for shared communal symbols, ugly scenes of partisan and sectarian assertion. The transformation is not required, but repelled, by sound constitutional principles.

The plaintiffs have sought, clearly and explicitly, to link the Village with their religious expression by standing a crèche on Boniface Circle. As the District Court found, they desire the appearance of endorsement, an "aura" of public support, by making the public site their "message bearer." The point is hammered home by their insistence that public placement alone supplies the "ecumenical" appearance they desire. In pursuing this public joinder in their religious expression, the plaintiffs rely on the universal awareness that symbols tend to become associated in viewers' minds and feelings with the place in which they are seen. Courts, scholars and lay observers have noted repeatedly how a religious symbol planted on public ground conveys an impression of public affirmation and support. Thus, the plaintiffs seek to foist upon their fellow

villagers support of their religious statement, a species of forced expression against which the First Amendment is a protection.

Plaintiffs' effort is not one Scarsdale is compelled to implement merely because it has supplied a "public forum" for living speakers and listeners. The valued conception that parks, held in trust for all the people, are public forums has never signified, and should not come to signify, that they are places where people have a right to place and leave signs or statues or symbols that their neighbors, speaking through elected officials, find disagreeable, repugnant, painful or offensive. Contentious views that speakers must be allowed to express in the public forum are not thereby required to be allowed in the form of signs or symbols left unattended for days or weeks. A largely black village need not tolerate a burning cross on its green. A Jewish population need not make space on which to leave a swastika. A typically religious community need not allow a billboard on public land to argue, for two weeks or so around Christmas, that "religion is the opium of the people."

Against plaintiffs' weak interest in adding a park to all the other places in Scarsdale where Nativity scenes are or may be freely displayed, the Trustees weighed, and found properly overriding, countervailing interests in (1) avoiding coerced expression, (2) avoiding favoritism, or the appearance of favoritism, toward one sectarian position and (3) steering clear of an Establishment Clause violation in "letter or spirit." When the competing claims are assessed, even assuming that Scarsdale may in its circumstances allow a crèche at Boniface Circle, there is no sound basis for concluding that it must. Even on the doubtful premise that Scarsdale would have to demonstrate a "compelling interest" to resist plaintiffs' demand, the concerns just summarized would satisfy that standard.

II. The decision in *Lynch* v. *Donnelly* is distinguishable in several material respects. In any event, the ruling that Pawtucket was allowed to emplace a crèche does not mean or imply that Scarsdale is compelled to.

The difference between the private land in *Lynch* and the public oval here is significant. It is also important that Pawtucket's crèche was part of a "display" of mostly nonreligious, noncontroversial objects (Santa Claus' house, reindeer, a clown, an elephant, etc.) while the Scarsdale crèche has always stood, and is proposed to stand, in sharp, isolated relief. A further distinction of consequence is found in the absence of divisiveness on this subject in Pawtucket's history as against the long course of frequently bitter, acrimonious strife in Scarsdale. If, as was noted, the absence of divisiveness was significant in *Lynch*, its presence is significant here. Finally, there was a secular purpose officially proclaimed and found for the display of a Nativity scene in Pawtucket. A comparable purpose is not asserted, but is denied, by Scarsdale's Trustees. Here, only plaintiffs' religious purpose, including the drafting of their neighbors to support their religious expression on the shared land, would be served by a judicial decree commanding that a crèche be permitted in Boniface Circle.

Returning, finally, to *Widmar* v. *Vincent*, it is meaningful that the Establishment Clause defense there was not weighty, persuading no Justice of this Court, while the question here is surely as close as it can be. As this Court has taught repeatedly in picking the delicate way between the Religion Clauses, the interest reflected in either Clause may be a weighty ground justifying an official decision even where that decision is not compelled. In this important sense, the return to *Widmar* serves to underscore the cogency of the grounds on which Scarsdale's Board acted. A strong Establishment Clause interest, at a minimum, is added to the other justifications for resisting plaintiffs' demand. The totality defeats the contention that a court order should require installation of a crèche in the Scarsdale park.

ARGUMENT

I. MUNICIPALITIES ARE NOT REQUIRED TO PROVIDE PUBLIC SITES AND SUPPORT FOR SECTARIAN OR PARTISAN SIGNS OR SYMBOLS THAT OFFEND OR ALIENATE SOME RESIDENTS

This Point involves primarily the Free Speech Clause, and incidentally the Establishment Clause. In dealing with the question treated here, the respondents and the Court of Appeals have considered the case on the crude premise that expression, whether oral or in the form of an inanimate symbol, is undifferentiated "speech," governed by constitutional rules that are uniform across the board. That is a basic error. It has resulted in a ruling that today compels the Village to allow a Nativity scene to stand in a park at the Village center, and tomorrow, on the same free speech principle, will compel a place for a swastika, a hammer and sickle, vulgar signs and comparable varieties of symbolic "speech."

This unprecedented and intolerable result follows from a mechanical misuse of critical words and concepts. A "public forum" for speakers and oral discourse is transformed into an unheard of species of village common where the residents must support, and appear to endorse, structures and symbols that convey ideas the majority (through their representatives) find unsuitable or repugnant, whether because they divide neighbors from each other, because they are hateful (as are swastikas, for example, to most people), because they are ugly, or because on other grounds they do not satisfy the shared communal sentiments that account for statues or symbols villages place on their greens or parks.

The First Amendment has never been imagined to command such things. On the contrary, whatever municipalities may do in their parks, the right of their people under the First Amendment to resist forced expression argues forcefully against this kind of compulsion. The extension of *Widmar v. Vincent*, 454 U.S. 263 (1981), to order Scarsdale over its objection to have a Nativity scene stand for two weeks in Boniface Circle is a profound error.

A. Plaintiffs Demand an Aura of Public Support for, or Joinder in, Their Religious Expression

The plaintiffs, as they declare, demand that one or both of their crèches[4] stand on Boniface Circle to serve their "desires to join in the Village's celebration of 'Christmas' by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions" (J.A. 8). That the crèche will serve "to celebrate and express religious convictions" is a constant and vital theme (*see* J.A. 7, 70, 160, 171, 172, 251, 268, 291; J. Ex. 157, 163, 186, 187, 205; Stip. Ex. 62 at p. 44). The crèche does this by itself, without human participation or accompaniment. To judge by the only one who testified on the subject, plaintiffs have no special interest even in appearing at the site to look at, enjoy or "join in" the expression of religious convictions (Pet. App. 55a n.18). It is the crèche on the public circle that joins the Village in their religious expression.

The absence of any plaintiff from that scene—the stated indifference at best to being present with their crèche—poses sharply the question: whose speech is this? Perfectly free to proclaim their Christian message in person, plaintiffs are not there. Nobody doubts they could illustrate their own public speech with a crèche at their side if they chose to. What they choose, however, is to place the crèche itself—alone—on the public ground, making a *public* statement.

As the District Court found (*id.* at 56a-58a), it is this desired joinder of symbol and public site for which the plaintiffs are pressing. In this bonding, the land becomes, physically and spiritually, the "message bearer" (*id.* at 55a-56a). In a village that abounds with churches, and with Nativity scenes widely and unobjectionably present on nonpublic land (*id.* at 38a-39a), no purpose or effect other than the fact of this statement enthroned on the public demesne is sought or served by

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4 It has never been clear why two groups, with two different crèches, found it necessary to sue. In a brief opposing certiorari (p. 5 n.2) the Citizens Group for the first time announced that it would withdraw its demand if the Creche Committee's Nativity scene is ordered to be placed on Boniface Circle.

plaintiffs' demand under the First Amendment. What they seek, in a word, is "the appearance of an endorsement of their beliefs and practices from the [Village]." *Widmar* v. *Vincent*, 454 U.S. at 288 n.7 (White, J., dissenting).

Candidly etching this thought, plaintiffs have told us that only the public land supplies the "ecumenical" quality they seek. In addition to a private site across the street from Boniface Circle, plaintiffs were offered and rejected nearby church properties on which to place a crèche. While asserted problems of topography and location were mentioned, their "first" and "preeminent" reason for refusing a church site was that this "would destroy the ecumenical aspect of the Creche Committee" (Pet. App. 37a; J.A. 275). This is powerfully revealing. Plaintiffs are aware, obviously, that an accompanying sign could describe their crèche as that of the Creche Committee, not that of the church on whose land it stood. But they do not find that arrangement agreeable (J.A. 276-77). The Court of Appeals has advised them that a large enough sign will obliterate any impression of identification between the Village and their crèche standing on the Village's central public circle (Pet. App. 22a). But plaintiffs know better, as everyone should; they concede that the passerby, who may or may not read and carefully construe a sign, inevitably would associate the crèche on the church land with the church (*id.* at 56; J.A. 276, 311). *See FCC* v. *League of Women Voters*, 104 S. Ct. 3106, 3137 n.10 (1984) (Stevens, J., dissenting). Similarly, the crèche on the public land—not least for the young and impressionable— will have an association with the public. [5]

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5 A Scarsdale letter-writer opposed to having the crèche on Boniface Circle wrote (Pet. App. 51a n.16): "Although I'm only 13 I feel the creche, a deeply religious symbol does not promote 'good will.' I am Jewish: my menorah lights will burn in my home. I like to think Boniface Circle belongs to all Scarsdalians."

The Court of Appeals was caused to "hesitate" about children, but found reassurance in the absence of psychological evidence on this subject (Pet. App. 20a). While the point is not critical, it might be argued that judges may notice that a heavily traveled circle at the village center is frequented by children and that children may experience more intensely than adults the

That is the distorted meaning of "ecumenical" in this setting. This species of "ecumenism" does not embrace the nonChristians in Scarsdale. The only embrace is the enlistment of nonconsenting villagers in a public alliance with plaintiffs' statement through a religious symbol of plaintiffs' religious assertions and convictions.[6] Plaintiffs' sound understanding of this reflects what courts, nonlegal scholars and all of us know about the power of charged symbols and their association with places and institutions.

B. Signs and Symbols, Affixed to the Shared Public Land, Convey the Quality of Public Joinder or Approval Sought by Plaintiffs, and Are thus Materially Different from Speakers or Leafleteers Who Deliver Their Own Messages and then Depart

Though it receives no notice in the opinion of the Court of Appeals, the difference between live speakers and an emotionally significant, unattended symbol is a cardinal fact in this case. All of us are conditioned from our earliest days to know that the statue or symbol standing in the park—be it George Washington or the flag and the war memorial that are the only such things in Boniface Circle—are wrapped in the shared and approving sentiments of the community. The thoughts and feelings they express are reinforced by their location and literal support on the public platform. Symbols objectionable to many residents are not found there. The people do not give "house room" or implicit approbation to symbols that many

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emotional impacts of dramatic symbols. On judicial knowledge of how humans, adults and children, respond to social experiences, *compare Plessy* v. *Ferguson*, 163 U.S. 537 (1896), *with Brown* v. *Board of Educ.*, 347 U.S. 483, 493–94 (1954).

6 See Judge Stewart's appraisal (Pet. App. 57a): "Imbuing the creche with an ecumenical appearance . . . would seem to occur *only* if Village land—the property of 'all the people'—is in fact linked in the receiver's mind with the message, since there is nothing inherently ecumenical about the creche standing alone."

of them find painful or repugnant even where many or more others may find them agreeable.[7]

The power of association, brigading a symbol with its location, is of special consequence in dealing with religious symbols that are cherished by many or most people but are objectionable to others. Reflecting this reality, the District Court was in turn reflecting evidence in the record of this case illustrative of what everyone knows. The Mayor of Scarsdale when this suit began—herself a Christian, possessor of a private crèche, who had voted formerly to allow the display in Boniface Circle but had come to deem that a mistake (Pet. App. 34a, 37a, 60a)—put the thought in unadorned terms. Contrasting the crèche on Boniface Circle with the recurrent (and noncontroversial) use of Village buildings for varieties of religious services, she said (Pet. App. 60a; J.A. 295):

> the placement of the Creche in the center of the village . . . is more permanent, it is a solid seeable religious artifact . . . and you see it there in the heart of Scarsdale on village property like the village is supporting it.

Others in the Village, Christian and nonChristian, expressed the same idea. A group of Christian clergymen, urging that the crèche should be on private rather than public land, declared that (Pet. App. 32a)

> it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.

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7 The District Court found that a substantial portion of Scarsdale's population is not Christian (Pet. App. 36a). While objections to the crèche came from Christians as well as others (*e.g.*, J.A. 44), it is not immaterial that by 1980 "Jews comprised the largest ethnic group in [Scarsdale], constituting roughly 50 percent of the total number of families." C. O'CONNOR, A SORT OF UTOPIA—SCARSDALE 1891-1981 188 (1983).

One opponent of allowing the crèche on Boniface Circle viewed its placement there as designed to "teach the rest of us that Scarsdale is still a Christian community" (J. Ex. 184). Other objectants spoke to similar effect.[8]

Perhaps even more strikingly, people insisting that the crèche should be on Boniface Circle made explicit its quality there of joining the Village in the religious expression. Illustrating from the record, the District Court mentioned *inter alia* a number of letters protesting the denial of permission to stand the crèche on Boniface Circle (Pet. App. 35a):

> One such letter/petition, subscribed to by about eighty or so signatories, stated, "Unless we are mistaken the United States is regarded by the world as a christian [sic] country, and the creche is simply a symbol of our christianity." Many letters deplored the ending of what they described as a "Village" or "Scarsdale Tradition." The letters at times refer to the creche as the "Scarsdale Creche."[9]

Like the residents of Scarsdale, the courts have noted that highly charged religious symbols deliver a message that may be powerfully buttressed by a public setting. A Denver court recorded "convincing and uncontroverted evidence . . . that the City's placement of [a] Nativity Scene on the front steps of the City and County Building (the very building to which the citizens must turn for government) is widely viewed as an affirmation and support of the tenets of the Christian faith." *Citizens Concerned for Separation of Church & State* v. *City & County of Denver*, 481 F. Supp. 522, 529 (D. Colo. 1979), *vacated on other grounds*, 628 F.2d 1289 (10th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981).[10] See to the same effect, in

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8 *See, e.g.*, J. Ex. 162 ("those who perceive [the crèche] in its public setting will recognize a public sanction and endorsement accorded the particular religious doctrine"); J. Ex. 163; Stip. Ex. 62 at pp. 8, 23, 28, 37, 40.

9 *See also* Stip. Ex. 63 at pp. 95, 100, 105-13, 150, 158; Stip. Ex. 65 at pp. 22, 26, 51 ("I am very puzzled by the Scarsdale Village Board's decision not to honor the birth of Christ on public property").

10 In a subsequent decision on the Denver situation, another district

the same setting, *Conrad* v. *City & County of Denver*, 656 P.2d 662, 675 (Colo. 1982). The "steps of the City and County buildings" may produce the appearance of an imprimatur more dramatically than the contested location in a central public circle, but the difference is one of degree, not of kind. Far from any public building, as a Georgia district court held, a "cross on state parkland impermissibly enmeshes state and church by creating the appearance of official backing for Christianity." *ACLU* v. *Rabun County Chamber of Commerce*, 510 F. Supp. 886, 892 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983).[11] Similarly, as stated in a dissent that became the opinion of the Oregon Supreme Court, a cross permitted to be erected on public property, though not adjoining a public building, was seen to have "placed the city officially and visibly on record in support of those who sought government sponsorship for their religious display." *Lowe* v. *City of Eugene*, 451 P.2d 117, 124 (Or.) (Goodwin, J., dissenting), *vacated on rehearing*, 459 P.2d 222, *aff'd on further rehearing*, 463 P.2d 360 (1969), *cert. denied*, 397 U.S. 1042 (1970).[12] *See also Gilfillan* v. *City of Philadelphia*, 637 F.2d 924, 931 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981);

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judge observed that the crèche there involved was surrounded by such things as a reindeer and Santa's Workshop and that it was "hardly distinguishable" from the other objects at night. *Citizens, Etc.* v. *City & County of Denver*, 508 F. Supp. 823, 827–28 (D. Colo. 1981). Disagreeing with the then extant decision of the district court in *Donnelly* v. *Lynch*, 525 F. Supp. 1150 (D.R.I. 1981), and substantially anticipating this Court's contrary result therein (*cf.* Point II, *infra*), he rejected Establishment Clause attacks on the display. *Citizens, Etc.* v. *City & County of Denver*, 526 F. Supp. 1310 *(D. Colo. 1981), aff'd*, No. 82-1022 (10th Cir. May 14, 1984).

11 The cross in *Rabun County* was permanent, as was the cross in the case cited next. Again, the point of the association between the prevailing religion and the public authority is not essentially altered.

12 The quoted opinion of Judge Goodwin (now of the Ninth Circuit) had an odd sequel as well as a somewhat tortured history. Some years later, the sponsorship having changed to the American Legion, the Oregon Court (4–3) allowed the maintenance of the cross on city property. *Eugene Sand & Gravel, Inc.* v. *City of Eugene*, 558 P.2d 338 (1976), *cert. denied*, 434 U.S. 876 (1977).

Greater Houston Chapter of ACLU v. *Eckels*, 589 F. Supp. 222, 234-35 (S.D. Tex. 1984); *Goldstein* v. *Fire Department of Suffern*, 559 F. Supp. 1389, 1391 (S.D.N.Y. 1983); *Fox* v. *City of Los Angeles*, 587 P.2d 663 (Cal. 1978).

Universal human experience repeats the lesson recalled by this Court in *Spence* v. *Washington*, 418 U.S. 405, 410 (1974): "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." As scholars and all of us have observed, "people's responses to a symbol will be contingent upon their assessments of the circumstances of its usage."[13] So, for better or for worse, the same writers say: "When a particular symbol is used in conjunction with several other symbols, they may all become linked in the eyes of the general public."[14]

The impact of symbols and the associations between them are familiar matters though their full effects undoubtedly both transcend and precede consciously literal thought. The idea was captured in a landmark opinion of this Court, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943):

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes, the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person

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13 C. ELDER & R. COBB, THE POLITICAL USES OF SYMBOLS 57 (1983).

14 *Id.* at 77.

> gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

In somewhat more social scientific prose, it has been said that

> while words tend to represent consciously articulated mental states, the evocative power of non-verbal symbols stretches beyond consciousness into the unconscious . . . . A non-verbal symbol, such as the *cross*, is both a carrier of old, sometimes universal meanings no longer expressed or expressible by language, and a source of new meanings.[15]

In a word, District Judge Stewart identified a compendious reality when he characterized the effect of the relationship between the crèche and the special turf of Boniface Circle as making that land the public "message bearer." The subject is a powerful symbol and a dramatic linkage, all in a web of relationships where conscious and unconscious feelings make it impossible to ignore that the site endows the crèche with a special public "aura"—"ecumenical" in respondents' telling characterization—that would not attend the free "speech" of living speakers.

This is near the heart of the matter, entirely overlooked by the Court of Appeals. In terms of cognate rights under the First Amendment, both to engage in expression and to avoid forced expression, is it tolerable to imagine *forcing* a village (leaving aside what a village might do voluntarily) to fly in its park an American flag adorned—some would say "defaced"—with a peace symbol, a swastika, or a hammer and sickle? *Cf. Spence* v. *Washington*, 418 U.S. 405 (1974). Or to make a place in the park for a "sexually explicit 'adult' " (but not obscene) statue? *Cf. Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976). Or a sign denouncing a government policy with a four letter expletive? *Cf. Cohen* v. *California*, 403 U.S. 15

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15 Z. BARBU, SOCIETY, CULTURE AND PERSONALITY 96 (1971) (emphasis in original). *See also* Sapir, *Symbolism*, in 14 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 492, 494 (1939).

(1971). Or a lawyer's advertisement? *Cf. Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). A few days ago, on Veterans Day 1984, capping a series of emotional episodes, the President accepted for permanent placement on the Washington Mall a Vietnam Veterans Memorial.[16] Can it be argued seriously that the National Park Service must accept some other sign or symbol—whether permanently or for a week or two around each Veterans Day or Memorial Day—denouncing the Vietnam war, perhaps in the language of *Cohen* v. *California*, and declaring that the young men lost there gave their lives in vain?

The decisive point throughout is the patent difference between compelled placement on the public land of signs or symbols and the freely allowed presence of live speakers proclaiming their views or even advertising their wares. Once that difference is recalled, we move toward a sound end of the inquiry whether the residents of a village, through their elected representatives, are required over their objection to place in their parks statues or other symbols they find objectionable, divisive, ugly or otherwise unacceptable even though they express "protected" ideas. What the plaintiffs overlook in seeking to force their crèche onto Boniface Circle is the right of others not to join in their religious expression. The towns and villages of America would become nasty battlegrounds or ugly "immense bulletin board[s] whereon symbols of all [kinds] could be . . . displayed," *Fox* v. *City of Los Angeles*, 587 P.2d at 665, if the First Amendment were to be made the vehicle for such invasions. The freedom of the people to express their communal feelings in communally chosen symbols would be hobbled or sacrificed in a denial of all symbolic expression.[17] No such sullen choice is warranted, let alone

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16 *See* N.Y. Times, Nov. 12, 1984, at A1; *id.*, Nov. 11, 1984, at A28.

17 It is assumed that villages like Scarsdale could avoid the compulsion to display unwanted symbols by banning all symbols of every kind—Community Chest, Red Cross, etc.—from their parks. *Cf. Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 508 (1981); *id.* at 528 (Brennan, J., concurring); *id.* at 550-52(Stevens, J., dissenting in part); *id.*

commanded, by the First Amendment.

Returning more narrowly to the main precedent respondents invoke, the decisive difference between this case and *Widmar* v. *Vincent* is that the installation of the crèche on Boniface Circle gives to that religious message the kind of "imprimatur of State approval on religious sects or practices" which was not conferred there by the granting of a right to speakers to use University meeting facilities. 454 U.S. at 274. Particularly "[i]n light of the large number of groups meeting on campus," the Court doubted that "students could draw any reasonable inference of University support from the mere fact of a campus meeting place." *Id.* at 274 n.14; *see also id.* at 280 (Stevens, J., concurring). Here, in contrast, the crèche is the only sectarian (Pet. App. 58a),[18] or even controversial, symbol that appears ever to have stood, or been advanced for placement, on Boniface Circle.

The Missouri University meeting place was a "forum generally open" (454 U.S. at 267) for student speakers; Scarsdale's parks have never supplied a "forum generally open" for statues or symbols or other unattended displays of partisan or sectarian positions. The only exception, increasingly controversial, was the crèche in the years 1957–1980. That exception has been eliminated. Respondents seek to restore it by judicial compulsion.

Further distinguishing *Widmar*, that case dealt with the particular kind of "public forum" found on a university campus, where off-campus meeting places are noticeably removed from the physical community inhabited by potential participants and auditors. In Scarsdale, on the other hand,

at 570 (Rehnquist, J., dissenting); *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. 2118, 2130, 2135 (1984). Our argument is that allowing such symbols as those Scarsdale has permitted without objection "does not transform government property" into a setting available for signs and symbols of any and every kind, no matter how objectionable to many or even most residents. *Cf. Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

18 "[I]t appears that only one religious symbol has been offered for display in Scarsdale's parks for as far back as anyone can recall" (Pet. App. 58a).

crèches are freely displayed (without objection) outside private homes and churches (Pet. App. 38a–39a), and the several available sites for respondents' crèches include private sidewalk space across the street from Boniface Circle (*id.* at 37a).

In short, once we supply the appellate court's omission of the distinctions between a symbol and speakers, respondents' mechanical reliance upon *Widmar* v. *Vincent* is seen to be a mistake. That case does not support their demand that Scarsdale be forced to emplace on its park an unwanted, unattended religious symbol. In the remainder of this Point, we undertake to demonstrate that sound First Amendment law neither requires nor permits such a judicial command.

C. Municipal Authorities May Provide "Public Forums" that Are "Generally Open" for "Speakers," "Discourse" and "Debate" without Being Required to Allow Placement therein of Partisan or Sectarian Signs or Symbols

It is a shared premise in this case, not disputed if not perfectly realistic, that the parks of Scarsdale and other suburban or rural American villages are "public forums," used like the prototypical Hyde Park or like the city streets and parks addressed in the classic doctrine of *Hague* v. *CIO*, 307 U.S. 496 (1939). Thus, it is accepted that the principles of *Hague* are applicable and that Boniface Circle may be deemed a "public forum" within the compass of those principles. This means it is important to consider what a "public forum" is, and what it is not.[19]

Beginning with the fountainhead pronouncements in *Hague*, the vital conception of the "public forum" envisions shared

19 Though the "public forum" label may fairly be attached to all parks and streets, it has never been thought that identical rules of access must apply to all public forums. Even among streets and parks, "[t]he nature of a place, 'the pattern of its normal activities' " dictates the manner in which its use may be regulated. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *see Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981); *Niemotko* v. *Maryland*, 340 U.S. 268, 282-83 (1951) (Frankfurter, J., concurring). It is at least relevant, if not controlling, that Scarsdale's parks have never housed controversial symbols and that Boniface Circle—the site plaintiffs specifically demand—has been used only rarely for *any* symbols, and then only for a few hours.

common ground open to live people for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. at 515. The valued constitutional axiom is that people and groups can come together in the shared space to speak their minds, hear and be heard, agree or disagree, and learn freely from these encounters, with the State serving as neutral caretaker of the forum. The idea extends normally and naturally to people distributing leaflets, *Schneider* v. *State*, 308 U.S. 147 (1939), using amplification (within limits) of their voices, *Saia* v. *New York*, 334 U.S. 558, 562 (1948), and having with them symbols and accouterments that illustrate or underscore their declarations or preachments, *O'Hair* v. *Andrus*, 613 F. 2d 931 (D.C. Cir. 1979). It does not extend, however, to people leaving their leaflets behind them on the public land or placing their unattended symbols there. *See Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. 3065, 3070 (1984) ("we seriously doubt that the First Amendment requires the Park Service to permit a demonstration . . . involving a 24-hour vigil and the erection of tents"); *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2131.

The essence of the prized right has always involved living people, voicing views that are clearly and rightfully theirs.[20] *See United States* v. *Grace*, 461 U.S. 171, 184-85 (1983) (Marshall, J., concurring in part) ("Every citizen *lawfully present* in a public place has a right to engage in . . . expression") (emphasis added); *Schneider* v. *State*, 308 U.S. at 160 (discussing "the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature"). As this Court has lately

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20 "[B]y creating a forum the University does not thereby endorse or promote any of the particular ideas aired there." *Widmar* v. *Vincent*, 454 U.S. at 272 n.10.

reaffirmed, there is a difference markedly material for First Amendment purposes between speakers or distributors of leaflets whose "conduct continue[s] only while the speakers or distributors remain[ ] on the scene" and posted signs or symbols that are left on the public place and "remain unattended until removed." *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct., at 2131. The difference becomes vital enough to be decisive when, as here, there is no showing that the use of the public site "is a uniquely valuable or important mode of communication, or that [respondents'] ability to communicate effectively is threatened by . . . restrictions on expression." *Id.* at 2133.

In *Widmar* v. *Vincent*, the claimed foundation of respondents' case, the idea of *Hague* was carried forward in its familiar sense; the forum was generally "open to all forms of *discourse*" (454 U.S. at 273; emphasis added)—speech, talk, debate—"to religious and other *discussions*" (*id.* at 273 n.12; emphasis added). Not a word in *Widmar* suggests that a religious student group like the one there involved has a right to place in the University's meeting facilities a plaque containing the Ten Commandments, *cf. Stone* v. *Graham*, 449 U.S. 39 (1980), a Nativity scene, a Buddhist wheel, a menorah, a crucifix, or any other kind of sign or symbol. Notwithstanding other divergences, there appears to have been no disagreement with Justice White's observation in dissent "that the State need [not] stand by and allow its public forum to become a church for any religious sect that chooses to stand on its right of access to that forum." 454 U.S. at 287 n.5.

More broadly speaking, the idea of the "public forum" has never meant that there is a right under the First Amendment (or any other source) to demand public space for the placement of signs or symbols or other objects as forms of expression. *Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. at 3070; *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2131. Responsible public officials may provide space in the park for sculpture, temporary or permanent (as, currently, for works of Henry Moore in parks and other public sites around the country). But though all agree that artistic expres-

sion, ideological or not, is a First Amendment freedom, *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Winters* v. *New York*, 333 U.S. 507, 510 (1948), it is not supposed that the citizen has a right to display his or her plastic efforts in the park to make aesthetic, religious, political or other statements. People may not "insist that the flags of their choice be flown alongside the American flags that ring the Washington Monument." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 590 (1978). Before the remarkable expansion of *Widmar* v. *Vincent* by the Court of Appeals in this case, there was no basis for thinking that incantation of the phrase "public forum" would compel municipal authorities to make places in the park either for unattended signs and symbols most people hate—*e.g.*, vulgar denunciations of the draft, like the words protected in *Cohen* v. *California*, swastikas, etc.—or for objects that most people may love or revere, but that are nevertheless objectionable or repugnant to others on sectarian or other partisan grounds.

In short, a basic error of the Court of Appeals, fatal in itself, lay in its application of *Widmar* under the misconception that in the "public forum" every form of expression is fungibly "speech" in a relevant constitutional sense.[21] The pointedly "narrow" basis of that decision, 454 U.S. at 277, fails to support respondents' claim that Scarsdale *must* display their crèche in Boniface Circle.

The case would be different, of course, if Scarsdale took sides and discriminated among sectarian or partisan adherents.

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21 In lumping together all forms of expression as indistinguishable "speech," the Court of Appeals ignored this Court's several recent reminders that government can "tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 82 n.6 (Powell, J., concurring). The rules governing different forms of communication must "reflect the 'differing natures, values, abuses and dangers' " of each. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. at 501; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975). The law may respond to the "peculiar problems" of the medium, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952), even if this entails prohibiting in one setting expression that would receive constitutional protection in most others. *FCC* v. *Pacifica Found.*, 438 U.S. 726, 746-47, 750 n.28 (1978).

Fowler v. *Rhode Island*, 345 U.S. 67, 69 (1953); *Niemotko* v. *Maryland*, 340 U.S. at 272. But there is no question of this nature in the case. The plaintiffs support the demand for display of their crèches in Boniface Circle on the ground that other plots of Scarsdale's public land have been used to house briefly things like the Community Fund rocketship, a Girl Scout model campsite, the Red Cross symbol, the Cancer Committee sword and United Fund signs. These signs of basic American verities are displayed with no faint hint of any objection, opposition or upset on the part of anyone over any of them. If controversies of that sort should ever arise—very possibly triggered by pressures like the ones in this case to win the public places as ideological or religious possessions—hard questions will have to be faced. As things stand, however, nobody has reason to anticipate that the hammer and sickle need be added to the ring of flags around the Washington Monument any more than the largely black village in Mississippi must install a burning Klan cross on its green or Hasidim in upstate New York must feature a crucifix—all in the name of Free *Speech*.

D. Substantial Interests and Basic First Amendment Principles Sustain Scarsdale's Position

Three First Amendment interests must be harmonized in this case: (i) respondents' claimed right of free expression, for which they seek to place a crèche on Boniface Circle; (ii) the claimed right of their neighbors, also embraced by the Free Speech Clause, to refrain from appearing to support or join in religious ideas that they oppose when presented in this fashion; and (iii) the related interest of public officials in steering clear of Establishment Clause violations and preserving neutrality in both fact and appearance. Fairly weighed, the balance of these interests must be struck against the respondents. The overwhelming weight on petitioners' side is especially preponderant in light of the focused insistence of respondents that a crèche be displayed precisely at Boniface Circle or another public site when others (and theirs as well) are or can be freely displayed all over Scarsdale, both next to and away from the park.

The lines of principle and precedent supporting Scarsdale's position may be summarized under three other topic headings:

(1) The municipal government is entitled, and may be obliged, to refrain from causing its citizens to support, or appear to support, moral or religious or otherwise partisan ideas that substantial numbers of these people conscientiously oppose.

(2) The government is empowered, if not required, in managing its property and other affairs, to stand neutral among partisan or sectarian interests.

(3) The requirement of neutrality among religions includes a significant interest in avoiding even near approaches to collisions with the Establishment Clause.

We elaborate these thoughts in this subpoint.

1. *Avoiding compelled support.*—Appearing, as is respondents' desire, to be joined with the Village in its religious statement, the crèche located on Boniface Circle is opposed by Christians as well as nonChristians who see this as "mingling government and religion in objectionable fashion" (J.A. 44). If a court or other official overrides these and allied objections, compelling placement of the crèche in the park, these opponents are dragooned into supporting the symbol and its public statement. Compulsion of this kind amounts to a form of forced communal expression that is offensive under the First Amendment.

West Virginia State Board of Education v. *Barnette*, 319 U.S. at 642, is, again, a bright starting-point:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

That "fixed star," celebrating and protecting the autonomous human spirit, entails freedom from forced support of or identification with unacceptable ideas. Thus, the First Amendment protects employees from "compulsory subsidization of

ideological activity" by prohibiting unions from expressing political or ideological views over the objections of members or nonmembers compelled tc contribute to the union fisc. *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 235–36, 237 (1977). *See also Elrod* v. *Burns*, 427 U.S. 347, 355, 373 (1976). The owner of so impersonal an artifact as a license plate may not be forced to bear a message that is ideologically "unacceptable" or "morally objectionable." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977). Though it may be acceptable to or even cherished by most people, support of a message is not to be forced upon even a small minority for whom it "is repugnant to their moral and religious beliefs." *Id.* at 707. More than one recent utterance by Justices of this Court, even if not carrying specific decisional days, has warned against employment of shared public resources to "subsidize" or publish (or appear to be supporting) partisan positions that are uncongenial or offensive. *See FCC* v. *League of Women Voters*, 104 S. Ct. at 3131–32 (Rehnquist, J., dissenting); *id.* at 3133, 3136 n.7 (Stevens, J., dissenting) (public broadcasting "listener's interest in not having his tax payments used to finance the advocacy of causes he opposes"); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 551–52, 555 (1980) (Blackmun, J., dissenting) (utility's distribution of pamphlets in billing envelopes "amounts to a forced subsidy of the utility's speech by ratepayers" even though it "may cost the ratepayers nothing").

The concern for the religious or nonreligious objections of Scarsdale residents opposed to the public crèche display is more fundamental than the protection of "unwilling viewers against intrusive advertising," *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2129–30, that justified barring of political expression in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974). It is not in principle an extension of *Wooley* v. *Maynard* to say that municipal officials must not appropriate the village common for the erection of signs or symbols that are shown genuinely to offend or outrage

those who share in the ownership of that ground.[22] Shared village properties—whether "greens" or "commons" or small circles in a suburban place like Scarsdale—are freighted with at least as much emotional attachment as the official metal stamp that is a license plate. The differences in the physical objects and relationships are not such that the form of forced expression barred in *Wooley* v. *Maynard* is allowable in a park held for all the people.

Given the First Amendment protection against forced support or affirmation of repugnant ideas, there ought to be no doubt that a substantial black population of an American village should not be compelled to contemplate a burning cross standing unattended on the village green; that patriotic villagers are not required to display for days or weeks in the park a flag that has been in their perception defaced by markings permissible for display on private property, *see Spence* v. *Washington*, 418 U.S. 405 (1974); that municipal officials whose constituents include a Jewish admixture should not be ordered by a court to emplace on the public circle a sign saying "God does not hear the prayers of Jews." But all these afflictions follow from the Free Speech Clause as invoked by respondents and interpreted by the Court of Appeals in this case. Symbolic expressions that the majority detests are, if anything, more urgent concerns of that Clause than expressions the majority finds agreeable. *United States* v. *Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). Respondents have handled the foregoing implications at every stage of this case by simply ignoring them. The Court of Appeals did likewise. The unanswered question does not vanish or become less telling for being ignored.

Boniface Circle, like all parks, is a "unique resource[] that

22 The relevant thought of "offense" or even outrage is not confined to matters—swastikas, burning crosses, etc.—instantly characterized that way by almost everyone. There is a small but not inconsequential minority for whom such sacred things as the Bible are offensive. *See Abington School Dist.* v. *Schempp*, 374 U.S. 203, 283 (1963) (Brennan, J., concurring). There is a more substantial group for whom the interlacing of their own religion with the public authority is strongly objectionable as a cheapening of or intrusive threat against their faith. *See id.* at 259.

the . . . Government holds in trust for the . . . people," *Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. at 3067; it is "for all the people, and their rights are not to be trespassed even by those who have some 'statement' to make." *Id.* at 3072 (Burger, C. J., concurring). In this light, and under *Wooley* v. *Maynard*, it is solidly arguable that those opposing the crèche on Boniface Circle have a "First Amendment *right* to avoid becoming the courier" (430 U.S. at 717; emphasis added) in this fashion of a mode of expression repugnant to them. But there is no need in this case to reach that submission. It suffices to hold, as petitioners urge, that the Board was not compelled to grant permission to have the land bear the symbol and its sectarian message. Combined with the other substantial interests justifying this minor encroachment on respondents' rights, the avoidance of compelled support sustains the Village's decision.

2. *Avoiding favoritism or its appearance.*—Among the aspects of this case that are not adequately handled by pat labels is the concern of Scarsdale's Trustees to regulate the park properties evenhandedly. This is another case "falling between the paradigms of government property interests." *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2134 n.32. In terms of the cited passage, the property here involved is among "those clearly held in trust, either by tradition or recent convention, for the use of citizens at large." *Id.* This case falls outside that familiar paradigm, however, in presenting the demand for a *symbol* to be left in the park where the message is freely conveyed all over the Village but is opposed as a kind of public expression by others who are beneficiaries of the "trust." In these circumstances, the decision of the Trustees (who are trustees in the most literal legal sense) to refrain from forcing participation in respondents' religious expression is a sound fulfillment of their duty not to play favorites.[23]

23 In the traditional legal conception of their role, the Trustees are to seek maximally fair accommodation of their beneficiaries' competing interests. *See* 3 A. SCOTT, THE LAW OF TRUSTS § 232, at 1894-95 (1967); 2 A. SCOTT, THE LAW OF TRUSTS § 183, at 1471; RESTATEMENT (SECOND) OF TRUSTS § 183 (1959).

The government's interest in avoiding a partisan or sectarian stance or appearance is a weighty one. It has justified, though it does not require, restrictions on political speech, which "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey* v. *Brown*, 447 U.S. 455, 467 (1980). To remove "lurking doubts about favoritism," a municipality may discriminate against political advertisements, banning them from public busses while permitting other kinds of messages to be conveyed. *Lehman* v. *City of Shaker Heights*, 418 U.S. at 304. A military base open to visitors and invited speakers may be declared off limits to political speakers and pamphleteers to further "the constitutional tradition of a politically neutral military establishment." *Greer* v. *Spock*, 424 U.S. 828, 839 (1976); *id.* at 845 (Powell, J., concurring) (noting the "legitimate" public interest "in maintaining the reality and appearance of political neutrality").

Government's objective of maintaining the appearance of political neutrality—which, unlike religious neutrality, is not an explicit constitutional command—is sufficient to justify denial of core First Amendment rights of political expression to the whole class of civil service workers. *See CSC* v. *Letter Carriers*, 413 U.S. 548, 564 (1973); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 94–95, 102 (1947); *see also Elrod* v. *Burns*, 427 U.S. at 371 (in *CSC* and *Mitchell*, the Court held that "[s]ubordination of some First Amendment activity was permissible to protect other such activity"). So, too, limits on political contributions, which tread "in an area of the most fundamental First Amendment activities," can be justified by the government's interest in avoiding "the appearance of corruption." *Buckley* v. *Valeo*, 424 U.S. 1, 14, 27 (1976).

The concern with "appearance" pervades this subject and is a factor of consequence in the present case. *Cf. Roemer* v. *Board of Public Works*, 426 U.S. 736, 747–48 (1976); *Stone* v. *Graham*, 449 U.S. at 42; *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 125–26 (1982); *Lynch* v. *Donnelly*, 104 S. Ct. at 1368–69 (O'Connor, J., concurring); *Buckley* v. *Valeo*, 424 U.S. at 236 (Burger, C.J., concurring in part and dissenting in part); *id.* at 262, 265 (White, J., concurring in part and

dissenting in part); *FCC* v. *League of Women Voters*, 104 S. Ct. at 3132 (Rehnquist, J., dissenting). The appearance of public sponsorship or approval of the message of the crèche standing on the public place was correctly identified by the District Court as a matter of capital importance.

The concern to avoid sectarian favoritism, or the appearance of it, takes on particular significance when it is appraised against the essentially needless insistence of respondents on duplicating their symbol at Boniface Circle. Nativity scenes are displayed, and can be displayed without a murmur from anyone, on nonpublic land all over Scarsdale. Where there is such an abundance of outlets and such certainty that the message will be conveyed, the *free speech* claim on which respondents count dwindles markedly in the comparison. *See Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2132–33; *Regan* v. *Time, Inc.*, 104 S. Ct. 3262, 3294–95 (1984) (Stevens, J., concurring) (noting that there, too, the claimed "communicative interest" was a "weak" one); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 62, 71.

Apart from its special relationship to the commonly owned public land, a municipality may restrict "protected" expression even in private areas to further its "interest in preserving the character of its neighborhoods." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 62, 71. The comparison with *Mini Theatres* is limited, to be sure, on both sides of the scale—involving, for most people, a far less favored form of expression on one side, but also a less momentous municipal concern on the other. Acknowledging the gap, we may fairly invoke a major thought from Justice Powell's concurrence, adapted to the different facts here: "[Scarsdale] has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [Nativity scenes]. The [restriction] is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content." *Id.* at 78–79.

3. *Neutrality and the Establishment Clause.*—Assuming here, as throughout this Point, that the Establishment Clause does not *compel* Scarsdale to deny respondents' applications

(*cf.* Point II, *infra*), the Trustees' judgment nevertheless derives support from that Clause. The Court has marked as "perhaps the central purpose of the Establishment Clause . . . the purpose of ensuring governmental neutrality in matters of religion." *Gillette* v. *United States*, 401 U.S. 437, 449 (1971). Not less than courts, executive and legislative officials are bound to observe "that when government activities touch on the religious sphere, they must be secular in purpose, even-handed in operation, and neutral in primary impact." *Id.* at 450. In this close case, even if the Court should hold that it was not required by the "letter" of the Establishment Clause, Scarsdale's action was surely close to the "spirit," as the Trustees concluded (Pet. App. 31a).

The fact that Establishment Clause concerns are at least legitimate and substantial in this case adds support to the judgment of Scarsdale's Board. To paraphrase this Court's cognate observations on Free Exercise Clause concerns, "[q]uite apart from the question whether" the Establishment Clause required this judgment, "it is hardly impermissible" for the Board "to attempt to accommodate" the "values" for which that Clause exists. 401 U.S. at 453; *see also Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970). In connection with the Religion Clauses, as with other prized constitutional rights, it is fitting and proper for officials to assign weight to the constitutional interests at stake even when the resulting deference would not be compelled by a judicial decree. That proposition applies to the interests safeguarded by the Establishment Clause. *See Norwood* v. *Harrison*, 413 U.S. 455, 462, 469 (1973).

The "room for play in the joints" as between the Religion Clauses themselves, *Walz* v. *Tax Commission*, 397 U.S. at 669, extends to the accommodations required here, where both the Establishment Clause and competing Free Speech Clause claims are in issue. Especially in light of respondents' weak demand to replicate the crèche and its message on public land, this is a case where a decent latitude must exist for sober choice within the "neutral area." *Tilton* v. *Richardson*, 403

U.S. 672, 677 (1971).[24] In all the circumstances, if Scarsdale's Board could allow the crèche, it should not follow that it is compelled to. The interests under the Establishment Clause of those who profess minority religions or none at all are not less worthy than the Free Exercise interests that have been held in other cases to have weight without being controlling.[25] Scarsdale's Board did and could "rationally conclude . . . that constitutional neutrality . . . might best be achieved by withholding" the public site respondents demand. *Norwood* v. *Harrison*, 413 U.S. at 462, 469. This factor, revisited briefly later in the context of our Establishment Clause argument (pp. 47-48, *infra*), adds to the significant interests that vindicate Scarsdale's position.

E. Scarsdale's refusal to Display a Crèche is Sustained by Compelling Interests

For reasons canvassed in the preceding pages, however "rigorous" may be the "standard of review" applicable to this case, "the weighty interests" of Scarsdale under the First Amendment "are sufficient to justify the limited effect upon First Amendment freedoms caused by" denying a public site for crèches that may be displayed everywhere else in the Village. *Buckley* v. *Valeo*, 424 U.S. at 29. Even if the test be framed in terms of a "compelling state interest," that standard is satisfied. The Trustees confronted competing claims: on one side, respondents' weak interest in a public site, in addition to all manner of private sites, for a crèche; on the other side, the

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24 Other instances illustrate the space for judgmental distinctions between what the First Amendment compels and what it permits. As held in *Walz* v. *Tax Comm'n*, tax exemptions may be given to religious groups, but they do not appear to be compulsory. *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983); *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983). That transportation and textbooks may be supplied to parochial school children, *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947); *Board of Educ.* v. *Allen*, 392 U.S. 236 (1968), does not entail that they must be. *Norwood* v. *Harrison*, 413 U.S. at 462, 469; *Luetkemeyer* v. *Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974).

25 One group of respondents, it may be recalled, started with an unmeritorious Free Exercise claim that was abandoned after its rejection by the District Court. *Supra*, p. 8 & n.3.

First Amendment protection against forced sectarian expression, the duty fairly to administer public property and the close approach (at least) to an Establishment Clause violation. Combined, if not singly, these latter interests are fairly characterized as "compelling." Scarsdale's Trustees could certainly deem "paramount" the interests opposed to respondents'—could, as they did, find this a situation where "[s]ubordination of some First Amendment activity was permissible to protect other such activity." *Elrod* v. *Burns*, 427 U.S. at 362, 370–71.

There is no mathematical test, obviously, for assigning weights to various interests in this setting.[26] The answer in every case must be found in the Court's informed judgment. Recalling a variety of instances where interests have qualified as "compelling"—and thus sufficient to justify suitably drawn restrictions on speech—petitioners submit that the present case merits that characterization. *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976), treating as "compelling" the interest in uncorrupted elections; *see Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. at 540; *FCC* v. *League of Women Voters*, 104 S. Ct. at 3124-26; *Regan* v. *Time, Inc.*, 104 S. Ct. at 3271; *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 94 (1977); *Carey* v. *Brown*, 447 U.S. at 471. *Cf. CSC* v. *Letter Carriers*, 413 U.S. 548 (1973).

II. *LYNCH* V. *DONNELLY*, ALLOWING MUNICIPAL OFFICIALS TO INCLUDE A CRECHE IN A DISPLAY, IS DISTINGUISHABLE AND DOES NOT SUPPORT A JUDICIAL ORDER COMPELLING SCARSDALE'S BOARD TO PERMIT A CRECHE IN BONIFACE CIRCLE

The Court of Appeals reasoned that:

(i) *Widmar* held that the University's Establishment Clause claim did not make out a sufficiently "compelling interest" to warrant denial of its open forum to religious speakers (Pet. App. 14a).

26 "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." *United States* v. *O'Brien*, 391 U.S. 367, 376–77 (1968).

(ii) If Scarsdale chose to permit a crèche in Boniface Circle, it "would not contravene" the Establishment Clause under *Widmar* and *Lynch* v. *Donnelly* (Pet. App. 24a).

(iii) Therefore, since Pawtucket's officials were *allowed* in *Lynch* to display a crèche, Scarsdale's Trustees are *compelled* under *Widmar* to permit one in Boniface Circle.

Both the second and third steps in this reasoning are fallacious. Both, as argued in Point I, involve an erroneous equating of this case with *Widmar*. Proceeding further, both ignore that this case is distinguishable from *Lynch* in respects that make a decisive difference under the Establishment Clause.

Given the recency of *Lynch*, it would be inappropriate, and it seems unnecessary in any event, to reargue the elements of "the line-drawing process" leading to that decision. 104 S. Ct. at 1362 Instead, we simply outline the differences that are urged to place the present situation on the other side of the line. Then we show that *Lynch* is distorted if it is read to mean not only that some municipalities that desire crèches *may* have them but that municipalities that do not desire crèches *must*.

A. There are Material Distinctions between the Pawtucket and the Scarsdale Facts

1. The Pawtucket crèche stood on private land, 104 S. Ct. at 1358, unlike the markedly public Boniface Circle featuring the Village war memorial and an American flag.[27] The symbolic significance of the public place, pointedly desired by respondents for their crèches and vivid to everyone in the Village, has been discussed earlier. It is noteworthy in addition that respondents have been urged repeatedly and in vain—by the Advisory Council and the Trustees, among others—to accept a prominent private site for their display (J.A. 134,

27 The four dissenters in *Lynch*, focusing on its "narrow result," perceived sufficient differences in this regard to note that the decision "leaves open questions concerning the constitutionality of the public display on public property of a crèche standing alone." 104 S. Ct. at 1370 & n.1.

135, 136, 145, 146, 151–52, 157–58, 201, 204, 206, 222; J. Ex. 157-58, 162; Stip. Ex. 63 at p. 91; Stip. Ex. 66 at pp. 9, 13). There would be no objection and no controversy whatever if respondents accepted that alternative. Respondents' steadfast rejection of that option identifies precisely why they have insisted on the public platform—as a show of their right and power to "join" with them in their religious expression the entire Village, those who reject as well as those who revere the message of the Nativity scene.

In a Village where other crèches, without protest or limitation, appear on nonpublic church and residential sites to affirm the "real significance of Christmas time" (*see* Pet. App. 38a–39a; J.A. 70) nothing other than the public mantle makes the public site "uniquely valuable or important" for respondents' religious proclamation. *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2133. This significant point of Judge Stewart's opinion, not mentioned by the court below—that "the land actually becomes the message bearer" (Pet. App. 55a)—was absent from *Lynch*.

2. The Scarsdale crèche has always been presented and displayed standing by itself in Boniface Circle, starkly and singly making its religious statement where the only other structure is a war memorial and the American flag flies at the opposite end of this small oval. *Lynch* v. *Donnelly* involved an annual "display" that

> comprise[d] many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Clause house, reindeer pulling Santa's sleigh, candystriped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue [there]. [104 S. Ct. at 1358.]

The opinion of this Court over and over again referred to this "display" and defined the question presented as concerned with the practice of "including a crèche . . . in [an] annual Christmas display" (*id.*). Four dissenting Justices, citing the instant case in the District Court as a comparison, said that "given the Court's focus upon the otherwise secular setting of the Pawtucket crèche, it remains uncertain whether absent

such secular symbols as Santa Claus' house, a talking wishing well, and cut-out clowns and bears, a similar nativity scene would pass muster under the Court's standard" (*id.* at 1370 n.1). The concurring opinion concluded that the "display of the crèche in this particular physical setting" was not an endorsement of religion (*id.* at 1369).[28]

It is not useful to labor at length what that aspect of the Court's opinion meant or will come to mean in light of differing circumstances. Suffice it to note, first, that the swift dismissal of this "display-context argument" in one paragraph by the Court of Appeals (Pet. App. 22a–23a) is not readily reconcilable with the fact that this Court focused on the "display" by repeating that very word not less than 11 times in its factual discussion (104 S. Ct. at 1358) and several times thereafter, proceeding to its conclusion that "the presence of the crèche in this display" does not violate the Establishment Clause (*id.* at 1365). Unquestionably, as the Court of Appeals said, this Court also set the question in the broader context of the "Christmas Holiday season" and widespread seasonal decorations (*id.* at 1362). Many subjects call in this fashion for successively widening perspectives. But it is difficult to say that in a decision geared to the drawing of lines around the carefully identified particular circumstances (*id.* at 1361–62),

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28 The District Court found that plaintiffs' crèche was not displayed "as part of an event having an overriding secular effect" (Pet. App. 60a n.14). The Court of Appeals held the display issue irrelevant, finding *Lynch* not "based upon the physical context within which the . . . creche was situated" (*id.* at 23a). Guided by its focus on the broader context of the season, the Court found (*id.*) that the Christmas lights and ornaments installed throughout Scarsdale's streets (including Boniface Circle) and the one day carol sing permitted at various public sites through the years (including Boniface Circle, where, however, caroling has not coexisted with the crèche display since 1971) rendered "the Christmas celebration in the Village . . . not significantly different than the Christmas celebration described in *Lynch*." Narrowing the focus, it is clear—and uncontested—that viewers of plaintiffs' crèche see no other symbols on Boniface Circle to "negate[ ] any message of [government] endorsement." *Lynch* v. *Donnelly*, 104 S. Ct. at 1369 (O'Connor, J., concurring). From yet another angle, this case poses no question of whether the crèche would "'taint' the City's exhibit" (*id.* at 1365); here, the crèche has been and would again be the entire exhibit.

the frequently reiterated mention of the "display"—and the "inclusion" of a crèche therein—may be discounted as if the Court had not written it.

Certainly, as a matter of arresting impact, the crèche standing alone on the public oval is a more powerful symbol than a crèche in a display where it may come perhaps to be "hardly distinguishable" from the other, emotionally neutral objects around it. *See Citizens, Etc.* v. *City & County of Denver*, 508 F. Supp. at 827–28. The one federal court to consider the subject after the decision below, finding public display of such a symbol violative of the Establishment Clause, stressed that the Nativity scene before it stood on public property by itself; it concluded that this Court's *Lynch* decision "does not, either on its face or in any implicit proclamation, hold that a nativity scene standing alone . . . complies with the requirements of the separation of church and state required by our Constitution." *ACLU* v. *City of Birmingham*, 588 F. Supp. 1337, 1339 (E.D. Mich. 1984).

3. Divisiveness—actual and severe, not merely potential—has been notable in Scarsdale over the years of the crèche controversy. As a lead plaintiff has acknowledged (J.A. 248-49, 260), the issue has been a fierce one in Scarsdale for years; votes have been sought and cast on this basis (J.A. 65–66, 293; J. Ex. 191–92); threats and interdenominational rancor have attended the demand that the crèche convey its message on public land in addition to the ample private sites where crèches stand (Pet. App. 30a-39a; J.A. 38–41, 44–45, 65–66; J. Ex. 157–206). In contrast, there was "no evidence of political friction or divisiveness over the crèche in the 40-year history of Pawtucket's Christmas celebration." *Lynch* v. *Donnelly*, 104 S. Ct. at 1365. The record here, unlike that in *Lynch*, is replete with "evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." 104 S. Ct. at 1367 (O'Connor, J., concurring).

While divisiveness alone may not determine the question, it is "admittedly an evil addressed by the Establishment Clause." *Id.* The fear that neighbors would be pitted against each other

by jockeying for religious leverage in government, just as bloody wars had been fought so often over religion, played a palpable role in the adoption of this safeguard. *See Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 795–96 (1973); *Lemon* v. *Kurtzman*, 403 U.S. 602, 622–23 (1971); *Everson* v. *Board of Education*, 330 U.S. at 8–9; *Walz* v. *Tax Commission*, 397 U.S. at 694, 695 (Harlan, J., concurring). The absence of divisiveness was noted as "significant" in the concurring opinion in *Lynch*. 104 S. Ct. at 1369. Its presence is significant here.

In Scarsdale, both sides see the dispute in terms classically addressed by the Establishment Clause. The respondents demand uncompromisingly that the Village "join" in their expression. Opponents of the public site resist exactly that joinder. In the circumstances, the former habit of permitting the crèche on Boniface Circle was properly discontinued because it had become a "practice . . . [having] the effect of communicating a message of government endorsement . . . of religion"—thus making "religion relevant, in reality [and] public perception, to status in the political community." *Lynch* v. *Donnelly*, 104 S. Ct. at 1368–69 (O'Connor, J., concurring). *Cf. Larkin* v. *Grendel's Den, Inc.*, 459 U.S. at 126-27; *Lemon* v. *Kurtzman*, 403 U.S. at 622-23. The Scarsdale Trustees were on solid ground when they voted to deny the crèche applications because they "were concerned with violating either the letter or spirit of the constitutional prescription that there be a separation of church and state" (Pet. App. 31a).[29]

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29 The concept of "political division along religious lines," *Lemon* v. *Kurtzman*, 403 U.S. at 622, may not be unambiguous. It may refer to contending positions, arising in whole or in part from religious convictions, concerning such diverse subjects as abortion, welfare legislation, gambling and conscription, among many others. This kind of division is to be expected, welcomed and protected. *See id.* at 623; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 866–67 (1978); Gaffney, *Political Divisiveness along Religious Lines*, 24 ST. LOUIS U.L.J. 205 (1980). In another, quite different sense religions may compete *qua* religions for special "access to government or governmental powers." *Lynch* v. *Donnelly*, 104 S. Ct. at 1366 (O'Connor, J., concurring). Or in a related but more grave form of entanglement, adherents may seek "government endorsement or dis-

4. Pawtucket's officials argued successfully that they had "legitimate secular purposes" for including the crèche in their display. 104 S. Ct. at 1363. It was their judgment that this endeavor was a proper means of celebrating the national holiday and promoting Christmas business. *Id.*; *id.* at 1372 (Brennan, J., dissenting). No similar purpose is asserted or acknowledged here. On the contrary, Scarsdale's governing body has refused to have the crèche, finding that it serves no permissible secular purpose. In such circumstances, only respondents' religious purposes would be furthered by their use of the public land, in contravention of the Establishment Clause. *ACLU* v. *Rabun County Chamber of Commerce*, 510 F. Supp. at 891, 678 F.2d at 1391 (holding unconstitutional the placement of a cross in a public park because it was "erected 'out of [the] religious stirrings' " of private sponsors); *Allen* v. *Morton*, 495 F.2d 65, 85 (D.C. Cir. 1973) (Leventhal, J., concurring); *Goldstein* v. *Fire Department of Suffern*, 559 F. Supp. at 1391; *Lowe* v. *City of Eugene*, 463 P.2d at 362. *Cf. Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans* v. *Newton*, 382 U.S. 296, 301–02 (1966).

It is not an answer to say that the rule of *Widmar* v. *Vincent* establishes a secular purpose for having the crèche in Boniface Circle. If anything is clear in this record, it is that Scarsdale has never created a "forum generally open," on Boniface Circle or anywhere else, for the posting of sectarian or otherwise divisive statuary or symbols. Whether the exception for the crèche was right or wrong while it existed, it gives no First Amendment "secular" license for continuing this public display against the judgment of those responsible for running the parks on behalf of people of all religions or no religion at all.

It must be acknowledged in comparing this case with *Lynch* v. *Donnelly* that the differences do not necessarily run all one

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approval of religion" which "sends a message to nonadherents that they are outsiders, not full members of the political community." *Id.*; L. TRIBE, *supra*, at 868–69. The latter kinds of competition are those that ancient and contemporary history reveals as potentially dangerous. It is both the fact and appearance of such divisions that are concerns in this case.

way. The Court of Appeals thought the decision should be *a fortiori* for respondents herein because "the city involved in *Lynch* purchased, erected, displayed, sponsored and owned the creche therein" (Pet. App. 19a). That counts some against our position, though it must be added at once that it is a heady form of "state action" indeed for a federal court to compel a municipality to permit a religious symbol in its park. *Cf. Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. at 556 (Burger, C.J., dissenting).[30] The balance in the end calls for sensitive judgment on the particular facts, not the kind of relatively mechanical reasoning of the court below. It is our respectful submission that the distinctions stressed above—the public site, the dramatic isolation of the crèche, the divisiveness and the absence of any semblance of a secular purpose—differentiate this case materially from *Lynch*.

B. Even if Scarsdale Would not Violate the Establishment Clause by Allowing a Crèche, It Is not Required to Do So

In considering the University of Missouri's position in *Widmar* this Court followed the three-prong analysis in *Lemon* v. *Kurtzman*, found none of the "tests" flunked, and rejected the University's "compelling state interest" claim under the Establishment Clause. The Court of Appeals in this case undertook to duplicate that course. We have urged at length that the supposedly logical pattern does not fit because the *Widmar* premise of a "forum" for *speakers* is inapplicable. Here, briefly supplementing that argument, we reemphasize that a further distinction from *Widmar* has emerged. The Establishment Clause concern in that case, approved by no Member of the Court, was seen readily to be unfounded. In

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30 It might also be suggested that the *unseen*, nominal financial sponsorship by Pawtucket (104 S. Ct. at 1358) is a less apparent form of support than the conspicuous joinder of public land and religious symbol sought by plaintiffs. *Cf. Stone* v. *Graham*, 449 U.S. at 42; *ACLU* v. *Rabun County Chamber of Commerce*, 678 F.2d at 1389 n.19, 1390 n.22.

Lynch, the question was much closer. Even assuming the circumstances here are held to be governed by *Lynch* for Establishment Clause purposes, it seems obvious that the line between violation of and compliance with that Clause is on these facts of no more than a hair's breadth.

Whichever side of the line this case is on, the argument for Scarsdale's position under the Establishment Clause is significantly more powerful than the corresponding argument in *Widmar*. It is an argument of sufficient weight, all things considered, to make out the "compelling interest" that should bar a judicial decree commanding that a crèche be placed in Boniface Circle contrary to the judgment of the people's representatives. There is at minimum a cogent Establishment Clause *interest* in addition to the related objections of major constitutional import. *See* pp. 37-39, *supra*. The Trustees' position that permitting the crèche would violate the "letter or spirit" of the Establishment Clause is a responsible and weighty one, reached in unquestioned good faith.[31] In sum, both of our major Points support Scarsdale's position that it has validly respected the several First Amendment claims of all its residents in denying respondents' applications. If for no broader reason, the Board's decision should be sustained as a reasonable accommodation of all the relevant community interests at stake.

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31 *See* the acknowledgments by Trustees on both sides of the reasoned and mutually respectful process (J.A. 156, 167–8, 169).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

MARVIN E. FRANKEL
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November 29, 1984

No. 84-277

Office - Supreme Court, U.S.
FILED
DEC 5 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—v.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGAR, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON AND GREGORY DE SOUSA

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN AND MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed August 17, 1984
Certiorari Granted October 15, 1984

31880

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* Omissions from the text of documents reprinted in part are indicated by asterisks, or, in some instances, by bracketed notations. All certificates of service have been omitted in printing.

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DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

83 Civ. 0987
83 Civ. 3266

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGAR, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON AND GREGORY DESOUSA

Plaintiffs,

-against-

JEAN STONE, ELISABETH M. BROWN, EDWARD FALKENBERG, BEATRICE K. UNDERWEISER, THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE AND THE VILLAGE OF SCARSDALE,

Defendants.

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN AND MARIA PEDULLA,

Plaintiff,

-against-

THE VILLAGE OF SCARSDALE AND THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE,

Defendants.

Date	NR.	Proceedings
1983		
2-7	1	Filed COMPLAINT and issued summons and notice pursuant to 28 USC 636 (c) in McCreary, et al. v. Stone, et al.
3-31	7	Filed ANSWER of defendants Stone, et al.
4-28	—	Filed Complaint—Issued Summons & Notice in Scarsdale Creche Committee, et al. v. The Village of Scarsdale, et al.
5-27	—	Filed Answer of defts Village of Scarsdale and Board of Trustees of the Village of Scarsdale
6-15	14	Filed stip and order consolidating 83 Civ. 3266 and 83 Civ. 0987 for all purposes.
7-13	24-29	Filed appendix to stipulated facts, Volumes 1 through 6.
7-14	31	Filed the parties stipulated facts.
12-8	37	Filed Opinion No. 55491 the Judgment is for defendants in all respects—Stewart, J. m/n.
12-15	38	Filed Judgment ordered that this consolidated action be dismissed.
1984		
2-19	39	Filed plaintiffs McCreary, et al. notice of appeal to the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
83-9052

Date	Proceedings
1984	
6-21	Judgment reversed, published opinion filed
8-27	Mandate issued (Judgment, Opinion and Statement of Costs)
10-17	Order granting petition for a writ of certiorari filed

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHLEEN S. McCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSINGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON AND GREGORY DE SOUSA,
Plaintiffs,

—v.—

JEAN STONE, ELIZABETH M. BROWN, EDWARD FALKENBERG, BEATRICE K. UNDERWEISER, THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, AND THE VILLAGE OF SCARSDALE,
Defendants.

The Plaintiffs, by their attorneys, complain of the Defendants and allege upon information and belief that:

1. This Court has jurisdiction over this action under Title 28, United States Code, Section 1331 and Section 1343(3).

2. The acts and conduct alleged in this Complaint occurred and will occur within the Southern District of New York.

3. As a result of the acts and conduct alleged in this Complaint, the Plaintiffs seek redress under Title 42, United States Code, Section 1983 for the deprivation by the Defendants under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges or immunities secured by the Constitution and laws of the United States.

4. The rights, privileges or immunities which have been deprived from the Plaintiffs are the freedom of speech and the

free exercise of religion which are protected by the First and Fourteenth Amendments to the Constitution of the United State.

5. This is an action for preliminary and permanent injunction enjoining the Defendants, and each of them, their agents, employees and successors and all persons in active concert and participation with them from continuing a policy, practice, custom or usage of denying residents of the Village of Scarsdale, New York, access to and temporary use of an open and public forum in the Village solely on account of the content, nature and purpose of the expected speech or expression by such residents and its deemed communicative impact.

6. This is also an action for a declaratory judgment under Title 28, United States Code, Sections 2201 and 2202 for the purpose of determining the following questions in actual controversy between the parties.

(a) Whether the Defendants may adopt and continue to enforce any ordinance, regulation, policy, custom or usage of prohibiting access to and temporary use by residents of the Village of Scarsdale, New York, of an open and public forum in the Village under their jurisdiction, management and control on the basis of the content, nature and purpose of speech or expression expected to be professed thereon and its deemed communicative impact.

(b) Whether the Defendants may deny the Plaintiffs access to and temporary use of Boniface Circle, a Village-owned park land in Scarsdale, New York, for the purpose of placing, without public expense or support, a display contributing to the celebration and message of the "Christmas" holiday.

7. This is also an action to recover damages resulting from Defendants' denial of the rights, privileges or immunities of freedom of speech and free exercise of religion of certain Plaintiffs which are civil and constitutional rights protected by the laws of the United States.

8. The Plaintiffs are Kathleen S. McCreary, David Drabkin, Ann F. Cawley, Angelina J. Messinger, Edward R. Napolitano, Charles E. Butler, John D. Hawkins, Nancy G. Steger, Richard Cacciato, Carol Ann Pascal, Mary T. Thom-

pson and Gregory de Sousa. Each Plaintiff is a citizen of the United States and a resident of the Village of Scarsdale, New York. The real property owned by each Plaintiff or a spouse is taxed by the Village of Scarsdale for the purpose of supporting parks, streets and other public forums which are under the jurisdiction, management and control of the Defendants.

9. The Defendants are: Jean Stone, individually and as Mayor and Trustee of the Village of Scarsdale; Elizabeth M. Brown, Edward Falkenberg and Beatrice K. Underweiser, each individually and as Trustee of the Village of Scarsdale; the Board of Trustees of the Village of Scarsdale, the individual members and the collective governing body; and the Village of Scarsdale, a Municipal corporation sited in the County of Westchester, State of New York. The Defendants have under their jurisdiction, management and control the parks, streets and other public forums located in the Village of Scarsdale, including Boniface Circle, a Village-owned park land.

10. For many years, the Board of Trustees of the Village of Scarsdale and the Village of Scarsdale have permitted, upon application, free access to the residents of the Village, individually and in groups, to Village parks, streets and other public forums in order for such residents to assemble, speak and express ideas and to place displays of an artistic or symbolic nature in or on such forums.

11. For many years, including 1982, the Village of Scarsdale has permitted the local Chamber of Commerce to place multi-colored lights and other symbolic decorations lining the several streets comprising the business district of the Village, commencing around December 1 of each year and extending through the beginning of the following year. This custom and practice is consistent with displays in communities throughout the United States where parks, streets and other public facilities are similarly decorated, and in particular around December 25, an official holiday in the United States and the State of New York known as "Christmas".

12. For many years, including 1982, the Village of Scarsdale, upon application, has permitted a group of its residents

access to and use of the steps of the Village Hall or Boniface Circle, a Village-owned park land centrally located amid the lights and other decorations referred to in the preceding paragraph, for the purpose of celebrating "Christmas" by speech, verse and song, including speech, verse and song honoring the birth of Jesus Christ of Nazareth, the occasion and namesake for the official holiday known as "Christmas". In recent years, the dramatic arrival of "Santa Claus" or "Saint Nicholas"[1] on one of the fire trucks of the Village of Scarsdale has been a feature of this celebration.

13. Each year since 1958 until 1981, the Board of Trustees of the Village of Scarsdale has permitted, upon application, the Scarsdale Creche Committee or its predecessors to place a Nativity Scene or Creche[2] on Boniface Circle during the period commencing shortly before and ending shortly after "Christmas". The Scarsdale Creche Committee, an association composed of representatives of several churches in the Village of Scarsdale, owns this Creche. Each year from 1958 until 1981, this Creche has been erected and maintained on and removed from Boniface Circle by the Committee without public expense or support. Commencing with the 1976 Christmas season, in compliance with a resolution of the Board of Trustees, the Committee affixed a sign to their Creche display on Boniface Circle stating that it was "erected and maintained by the Scarsdale Creche Committee, a private organization".

14. On December 10, 1981, in response to the customary application of the Scarsdale Creche Committee, the Board of Trustees of the Village of Scarsdale by a 4-3 vote denied the Committee access to and use of Boniface Circle for the purpose of erecting and maintaining their Creche during the 1981 Christmas season.

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1 A fourth century Christian Bishop of Myra, Asia Minor and patron saint of children who is recognized in many countries in stylized fashion as the religious and holiday spirit of Christmas personified.

2 A display composed of approximately half-life size figures of five adult persons and a child portraying the birth of Jesus Christ of Nazareth at Bethlehem.

15. On December 1, 1982, Defendants Stone, Brown, Falkenberg and Underweiser and the other members of the Board of Trustees of the Village of Scarsdale considered the customary application from the Scarsdale Creche Committee seeking permission to place their Creche on Boniface Circle during the 1982 Christmas season. The application was formally put to the Board of Trustees by a resolution that the application of the Committee to place the Creche on Boniface Circle be approved by the Board. By a 4-3 vote, and specifically by the negative votes of Defendants Stone, Brown, Falkenberg and Underweiser, the resolution was defeated.

16. On December 14, 1982, Defendants Stone, Brown, Falkenberg and Underweiser and the other members of the Board of Trustees of the Village of Scarsdale considered an application dated December 7, 1982 from Plaintiffs McCreary, Messinger, Napolitano and Cacciato and 13 other residents of the Village of Scarsdale seeking permission from the Board of Trustees to place a Nativity Scene or Creche on Boniface Circle during the 1982 Christmas season. The application of these Plaintiffs and statements to the Board of Trustees represented that the display was small and tasteful, privately owned, and would be erected, maintained and removed without any public expense or support, and that a notation would be placed on the display indicating that the display was made by private citizens and that the Village of Scarsdale did not support or sponsor the display. These Plaintiffs also represented in their application that the purpose of the display of their Creche was to celebrate and express religious convictions. After oral discussion on December 14, 1982, the application of these Plaintiffs was formally put to the Board by a resolution that the Board give permission to their application to place a Creche on Boniface Circle for the holiday season. By a 4-3 vote, and specifically by the negative votes of Defendants Stone, Brown, Falkenberg and Underweiser, and resolution was defeated.

17. The Village of Scarsdale has no ordinance, rule or regulation of specific application governing access to and use of Boniface Circle. The application of the Plaintiffs referred to

in the preceding paragraph was arbitrarily denied by Defendants Stone, Brown, Falkenberg and Underweiser, and by virtue of their action, the Board of Trustees of the Village of Scarsdale and the Village of Scarsdale. The denial by these individually named Defendants was based on the content, nature and purpose of the symbolic display and message of the Creche and its deemed communicative impact. Such denial was an invalid prior restraint on the freedoms of speech and religion of these Plaintiffs, and deprived them of rights, privileges or immunities protected by the Constitution of the United States.

18. The Plaintiffs by memorandum dated February 3, 1983 have requested that the Board of Trustees of the Village of Scarsdale consider their application for permission to erect and maintain a Nativity Scene or Creche on Boniface Circle during the 1983 Christmas season. This application represents to the Board of Trustees that the display is small and tasteful, privately owned, and will be erected, maintained and removed without any public expense or support, and that a notation will be placed on the display indicating that the display is made by private citizens and that the Village of Scarsdale does not support or sponsor the display. The Plaintiffs also represent in this application that among the purposes of the display of the Creche are their desires to join in the Village's celebration of "Christmas" by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions.

19. In view of the pattern of recent denials described in this Complaint, Defendants Stone, Brown, Falkenberg and Underweiser, the Board of Trustees of the Village of Scarsdale and their agents, employees and successors, unless enjoined by this Court, will in violation of the laws of the United States deny the application described in the preceding paragraph and future similar applications made by the Scarsdale Creche Committee and/or residents of the Village of Scarsdale.

20. Acting under color of authority conferred upon them under the laws of the State of New York and the ordinances of the Village of Scarsdale, Defendants Stone, Brown, Falk-

enberg and Underweiser and the Board of Trustees have adopted and are presently pursuing a policy, practice, custom or usage of prohibiting access to and use of Boniface Circle, an open and public forum in the Village of Scarsdale, on the basis of the content, nature and purpose of speech and expression expected to be professed thereon and its deemed communicative impact, and of openly curtailing religious expression. As described in this Complaint, the Plaintiffs have been denied and will be denied access to and use of Boniface Circle solely on account of the content, nature and purpose of their expected speech and expression and its deemed communicative impact. In making such denials, the Defendants were and will be depriving the Plaintiffs of rights, privileges or immunities secured by the First and Fourteenth Amendments of the Constitution of the United States.

21. Enforcement by the Defendants and their agents, employees and successors of the policy, practice, custom or usage pursuant to which the Plaintiffs were and will be denied access and temporary use of an open and public forum solely on account of the content, nature and purpose of speech and expression expected to be professed thereon and its deemed communicative impact, has resulted in and will result in irreparable injury to the Plaintiffs, by the deprivation of civil and constitutional rights protected under the laws of the United States.

22. The Plaintiffs have no adequate remedy at law.

WHEREFORE, the Plaintiffs request that this Court:

A. Issue a preliminary and permanent injunction enjoining the Defendants and each of them, their agents, employees and successors and all persons in active concert and participation with them (i) from governing, supervising and operating open and public forums in the Village of Scarsdale in a manner which denies access to and use of same to the residents of the Village of Scarsdale solely on account of the content, nature and purpose of speech or expression expected to be professed in or on such forums, (ii) from adopting and enforcing any ordinance, regulation, policy, practice, custom or usage which restricts and/or limits Plaintiffs as to their rights and privileges

of access to and use of such forums for the purpose of exercising the freedoms of speech and religion, and (iii) from denying Plaintiffs the right of access to and temporary use of Boniface Circle, solely on account of the content, nature and purpose of the speech or expression expected to be professed thereon and its deemed communicative impact;

B. Make a declaration of the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declaration shall have the force and effect of a final judgment;

C. Award damages to certain Plaintiffs for past deprivation of civil and constitutional rights;

D. Grant to the Plaintiffs such other additional or alternative relief as the Court may deem necessary and appropriate; and

E. Grant to the Plaintiffs their costs, expenses and attorneys' fees in this action.

Vincent K. Gilmore

Michael J. Murphy

Attorneys for Plaintiffs
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New York, NY 10004

ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED IN PRINTING]

Defendants Jean Stone, Elisabeth M. Brown, Edward Falkenberg, Beatrice K. Underweiser, The Board of Trustees of the Village of Scarsdale and the Village of Scarsdale, by their attorneys, Siff & Newman, P.C. and Kramer, Levin, Nessen, Kamin & Frankel, as and for their answer to the complaint allege upon information and belief as follows:

1. Neither admit nor deny the allegations contained in paragraph 1, since these allegations state conclusions of law.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2, except admit that the acts alleged in the complaint occurred within the Southern District of New York.

3. Deny the allegations contained in paragraph 3.

4. Deny the allegations contained in paragraph 4.

5. Deny the allegations contained in paragraph 5, except admit that this is an action for a preliminary and permanent injunction.

6. Deny the allegations contained in paragraph 6, except admit that this is an action for a declaratory judgment.

7. Deny the allegations contained in paragraph 7, except admit that an award of damages is sought in this action.

8. Admit the allegations contained in paragraph 8.

9. Admit so much of paragraph 9 as alleges that Defendants Edward Falkenberg and Beatrice K. Underweiser are Trustees of the Village of Scarsdale, that Elisabeth M. Brown was a Trustee of the Village of Scarsdale and that Jean Stone was Mayor and Trustee of the Village of Scarsdale, that they acted collectively with other Trustees, not named as defendants herein, as the Board of Trustees of the Village of Scarsdale, that the Village of Scarsdale is a municipal corporation sited in the County of Westchester, State of New York and that the streets and parks and other public properties located in the

Village of Scarsdale, including Boniface Circle, are under the jurisdiction, management and control of the Village of Scarsdale of which the Board of Trustees is the governing body. Defendants deny that the Trustees and Mayor acted other than in their official capacities as members of the Board of Trustees of the Village of Scarsdale, and otherwise deny the allegations in paragraph 9.

10. Deny the allegations in paragraph 10, except admit that the Village of Scarsdale and its Board of Trustees have permitted, upon application, access to Village parks and streets for various lawful requested purposes.

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11, except admit that the Village of Scarsdale has permitted the placement of lights and decorations in the business district of Scarsdale commencing around December 1 of each year and extending through the beginning of the following year, and on information and belief admit that other communities in the United States follow similar practices.

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12, except admit that the Village of Scarsdale has not objected to the use of public property for the purpose of a Christmas carol sing one afternoon or evening before Christmas and that in some years the arrival of "Santa Claus" or "Saint Nicholas" on one of the fire trucks of the Village of Scarsdale has been a feature of this event.

13. Deny the allegations contained in paragraph 13, except admit that from at least 1958 until 1981 the Board of Trustees of the Village of Scarsdale have permitted, upon application, a creche to be placed on Boniface Circle during December and January, that the creche has been erected, maintained and removed from Boniface Circle by the Scarsdale Creche Committee, that commencing with the 1976 Christmas season a sign was affixed to the creche display stating that it was "erected and maintained by the Scarsdale Creche Committee, a private organization."

14. Admit the allegations contained in paragraph 14.

15. Admit that allegations contained in paragraph 15.
16. Admit the allegations contained in paragraph 16.
17. Deny the allegations contained in paragraph 17.
18. Admit the allegations contained in paragraph 18.
19. Deny the allegations contained in paragraph 19.
20. Deny the allegations contained in paragraph 20.
21. Deny the allegations contained in paragraph 21.
22. Deny the allegations contained in paragraph 22.

FIRST DEFENSE

23. The complaint fails to state a claim upon which relief may be granted against the defendants.

SECOND DEFENSE

24. The granting of permission by the defendants to the plaintiffs to place a creche on Boniface Circle in order to give recognition to the birth of Jesus Christ and to celebrate and express religious convictions would have been in violation of the First and Fourteenth Amendments to the Constitution of the United States in that such action by the defendants would not reflect a clearly secular purpose and would have constituted the use of public property in support of religion and for religious purposes.

THIRD DEFENSE

25. The granting of permission by the defendants to the plaintiffs to place a creche on Boniface Circle in order to give recognition to the birth of Jesus Christ and to celebrate and express religious convictions would have been in violation of the First and Fourteenth Amendments to the Constitution of the United States in that said action by the defendants would have had the impermissible effect of advancing religion and would have constituted the use of public property in support of religion and for religious purposes.

FOURTH DEFENSE

26. The granting of permission by the defendants to the plaintiffs to place a creche on Boniface Circle in order to give recognition to the birth of Jesus Christ and to celebrate and express religious convictions would have been in violation of the First and Fourteenth Amendments to the constitution of the United States in that such action by the defendants would have constituted excessive government entanglement with religion.

FIFTH DEFENSE

27. Defendants Elisabeth M. Brown, Edward Falkenberg, and Beatrice K. Underweiser were duly elected as Trustees on the Board of Trustees of the Village of Scarsdale. Defendant Jean Stone was duly elected Mayor of the Village of Scarsdale and a Trustee on the Board of Trustees of the Village of Scarsdale.

28. On April 4, 1983 defendants Stone and Brown will cease to be Mayor and Trustees of the Village of Scarsdale.

29. The actions alleged in the complaint to have been taken by defendants Stone, Brown, Falkenberg and Underweiser with respect to the applications for placement of a creche on Boniface Circle were exclusively in their official capacities as Trustees of the Village of Scarsdale.

30. The Board of Trustees of the Village of Scarsdale has under its juisdiction the management and control of all public property located in the Village of Scarsdale.

31. Determining whether or not to permit any particular use of public property within the Village of Scarsdale is a discretionary function of the Board of Trustees.

32. Defendants Stone, Brown, Falkenberg, Underweiser and the other members of the Board of Trustees acted in good faith in all actions taken by them as Trustees relating to the use of Boniface Circle.

33. Defendants Stone, Brown, Falkenberg and Underweiser, and the other members of the Board of Trustees, as public officials who exercised their discretion in good faith in denying applications for the placement of a creche on Boniface

Circle, a public property in the Village of Scarsdale, are immune from personal liability for damages due to any alleged violation of plaintiffs' rights under 42 U.S.C. Section 1983.

Wherefore the Court is respectfully requested to:

(1) dismiss the complaint in its entirety as to the defendants Stone and Brown;

(2) dismiss the complaint insofar as it requests damages and injunctive relief against the defendants Underweiser, Falkenberg, the Board of Trustees of the Village of Scarsdale and the Village of Scarsdale;

(3) issue a judgment declaring (i) that the denial by the Board of Trustees of the Village of Scarsdale of plaintiffs' applications to erect a creche at Boniface Circle was not in violation of the Constitution of the United States or any other law, and (ii) that approval by the Board of Trustees of the Village of Scarsdale of plaintiffs' applications to erect a creche at Boniface Circle would have violated the First and Fourteenth Amendments of the Constitution of the United States;

(4) grant defendants such other relief as the Court may deem appropriate; and

(5) award defendants their costs, disbursements and attorneys' fees in this action.

Dated: New York, New York
March 30, 1983

SIFF & NEWMAN, P.C.

By:_____

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KRAMER, LEVIN, NESSEN,
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By:_____

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Attorneys for Defendants

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN AND MARIA PEDULA

Plaintiffs,

-against-

THE VILLAGE OF SCARSDALE AND THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE

Defendants.

Plaintiffs, by their attorneys, complain of Defendants and allege as follows:

1. This action is brought pursuant to Title 28, United States Code, Section 2201, and Title 42, United States Code, Section 1983, for the purpose of having declared unconstitutional, and to enjoin Defendants' continued enforcement of, and official policy, practice, custom or usage of excluding Plaintiffs from an open and public forum located in the center of the Village of Scarsdale solely on the basis of the content of Plaintiffs' anticipated speech and religious expression in that forum.

2. This Court has jurisdiction over this action pursuant to Title 28, United States Code, Section 1331, this being a civil action arising under the Constitution, laws or treaties of the United States, and pursuant to Title 28, United States Code, Section 1343(3), this being a suit in equity which is authorized by Title 42, United States Code, Section 1983, to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Constitution and laws of the United States. The

rights, privileges or immunities Plaintiffs seek to redress are the rights to freedom of speech, free exercise of religion and equal protection guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

3. Venue is proper pursuant to Title 28, United States Code, Section 1391(b) in that this is a civil action wherein jurisdiction is not founded solely upon diversity of citizenship, the claim arose in this judicial district and all Defendants reside in this district.

4. Plaintiff The Scarsdale Creche Committee (the "Committee") is a private unincorporated association of Protestant and Catholic churches located in the Scarsdale-Eastchester area. The Committee was formed in 1957 for the purpose of commissioning the sculpting of a wood-carved creche to be displayed in the Village of Scarsdale during the Christmas holiday seasons. The parishioners of seven churches presently comprise the membership of the Committee. These seven churches are Immaculate Heart of Mary, Trinity Lutheran, Church of the Good Shepherd, Grace Lutheran, Church of St. Pius, Scarsdale Community Baptist and Our Lady of Fatima. The parishioners of each church contribute approximately $25 annually to the Committee to defray the costs of displaying and maintaining the creche. Plaintiffs Curran, Barsuhn, Fellows, Adler, Tully, Mann and Pedulla are citizens of the United States and all but Plaintiffs Mann and Pedulla are residents of the Village of Scarsdale. Plaintiffs Curran, Barsuhn, Fellows, Adler, Tully, Mann and Pedulla serve on the Committee as representatives of the seven churches. Plaintiff Curran serves as Chairman of the Committee.

5. Defendants are the Village of Scarsdale (the "Village"), a municipal corporation located in the County of Westchester, State of New York, and the Board of Trustees of the Village (the "Board of Trustees" or the "Board"). Defendants have under their exclusive control and supervision the parks, streets, grounds and other public facilities located in the Village, including Boniface Circle, a Village-owned park or village green located in the center of the Village.

6. Upon information and belief, there are no statutes, laws, ordinances or rules in effect in the Village which prohibit or specifically regulate access to or use of public parks, streets, common grounds or other Village facilities. For many years Defendants have followed a policy, custom, practice or usage of permitting open access to these public areas. Defendants have accepted and have freely granted applications from individuals and groups seeking to use these public forums for speeches, meetings, parades, religious expression, placement of artistic or symbolic displays, fundraising, camping, recreation and school-sponsored sales.

7. For many years Defendants have permitted access to and use of several of the streets located in the central business zone of the Village by the local Chamber of Commerce for the purpose of installing and displaying Christmas lights and ornaments. The Chamber of Commerce has been allowed to display these lights and ornaments on Village-owned utility light poles for approximately one month each year, commencing on or about December 1 and ending shortly after January 1 of the following year. The Chamber of Commerce has not been required to seek permission from the Board of Trustees before displaying these lights and ornaments. The cost of the electricity has been borne by the Village and no proof of liability insurance has been required to be furnished by the Chamber of Commerce. No notice of the fact that it is the Chamber of Commerce which installs and displays the lights and ornaments has been required. Upon information and belief, this display of Christmas lights and ornaments is a traditional means by which the Chamber of Commerce celebrates and/or communicates Christmas holiday sentiments.

8. For many years Defendants have permitted access to and use of Davis Park, a Village-owned park land, by the Arthur Manor Community Association for the purpose of installing and displaying Christmas lights and ornaments on a large evergreen tree owned by the Village. The Arthur Manor Community Association has been allowed to display these lights and ornaments for approximately one month each year, commencing on or about December 1 and ending shortly after

January 1 of the following year. The Arthur Manor Community Association has not been required to seek permission from the Board of Trustees before displaying these lights and ornaments. The cost of the electricity has been borne by the Village and no proof of liability insurance has been required to be furnished by the Arthur Manor Community Association. No notice of the fact that it is the Arthur Manor Community Association which installs and displays the lights and ornaments has been required. Upon information and belief, this display of a Christmas tree in Davis Park is a traditional means by which the Arthur Manor Community Association celebrates and/or communicates Christmas holiday sentiments.

9. For many years Defendants have permitted access to and use of the lobby and entrance to Village Hall, the seat of Scarsdale's local government, by Village employees for the purpose of erecting, decorating and displaying Village-owned Christmas trees. Village employees have been allowed to display these trees in Village Hall for approximately one month each year, commencing on or about December 1 and ending shortly after January 1 of the following year. The cost of the electricity has been borne by the Village. Upon information and belief, this display of Christmas trees in Village Hall is a traditional means by which the Village and its employees celebrate and/or communicate Christmas holiday sentiments.

10. For many years Defendants have permitted access to and use of either Boniface Circle or the plaza outside Village Hall by the Town Club, a private group of Scarsdale residents, for the purpose of engaging in a Christmas carol sing. The Town Club's annual repertoire of Christmas carols includes many songs which commemorate the birth of Jesus Christ of Nazareth. Upon information and belief, this annual Christmas carol sing is a traditional means by which the Town Club celebrates and/or communicates Christmas holiday sentiments.

11. For many years Defendants have permitted access to and use of either Chase Park or Boniface Circle by the American Legion, the Red Cross, the United Way, the Boy Scouts of America, the Scarsdale Art Association and the Association of

Foreign Students for such purposes as speechmaking, patriotic celebrations, fundraising, camping, art shows and Halloween pumpkin sales. Upon information and belief, Defendants have permitted these groups to erect and temporarily display podiums, signs, structures, artwork and tents in connection with the above uses of Chase Park and Boniface Circle.

12. From 1957 through 1980 Defendants, upon application, permitted access to and use of Boniface Circle by the Committee for the purpose of erecting and temporarily displaying its wood-carved creche. Defendants allowed the Committee to display its creche each year for approximately a two and one-half week period, commencing on or about December 16 and ending shortly after January 1 of the following year. The Committee never solicited or received any funds, support or sponsorship from the Village or the Board of Trustees in connection with the annual display of its creche. The Committee was always exclusively responsible for the work and costs involved in erecting, displaying and removing the creche, and always furnished proof of liability insurance when requested to do so by the Board of Trustees. The Committee always restored Boniface Circle to its previous condition after the creche was removed.

13. During each Christmas season from 1976 through 1980, in response to and in compliance with a resolution passed by the Board of Trustees in 1976, the Committee prominently displayed a sign beside the creche which stated, "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization."

14. On or about November 1, 1981, the Committee submitted an application to the Board of Trustees seeking permission to erect and display its creche in Boniface Circle during the 1981 Christmas holiday season. The application represented that, as in prior years, the Committee would display the sign described in Paragraph 13 above and would be responsible for all work and costs involved in erecting, displaying and removing the creche.

15. On November 10, 1981, the Board of Trustees voted 4-3 to deny the Committee's application. The denial of the

Committee's application by the Board of Trustees was not based upon any statute, ordinance, rule, regulation or standards governing access to or use of Boniface Circle.

16. On October 25, 1982, the Committee submitted an application to the Board of Trustees seeking permission to erect and display its creche in Boniface Circle during the 1982 Christmas holiday season. The application represented that, as in prior years, the Committee would display the sign referred to in Paragraph 13 above and would be responsible for all work and costs involved in erecting, displaying and removing the creche.

17. On December 1, 1982, the Board of Trustees voted 4-3 to deny the Committee's application. The denial of the Committee's application by the Board of Trustees was not based upon any statute, ordinance, rule, regulation or standards governing access to or use of Boniface Circle.

18. The Committee's creche is both a religious symbol and a work of art. By erecting and displaying this creche, the Committee, its members and its representatives have, since 1957, sought to communicate, celebrate and artistically portray the birth of Jesus Christ of Nazareth and to communicate, celebrate and artistically portray ideas of peace, goodwill, love and tolerance among all mankind.

19. Upon information and belief, the Board of Trustees arbitrarily and capriciously denied the applications of the Committee referred to in Paragraphs 14 and 16 above solely on the basis of the content of Plaintiffs' anticipated speech and religious expression in Boniface Circle.

20. The conduct of the Board of Trustees described in Paragraphs 15, 17 and 19 above constituted invalid prior restraints on the rights to freedom of speech and free exercise of religion. By reason of the aforesaid conduct of the Board of Trustees, Defendants denied Plaintiffs their rights to freedom of speech and free exercise of religion, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

21. By reason of Defendants' conduct as described in this Complaint, Defendants unlawfully denied Plaintiffs equal ac-

cess to a public forum, in violation of Plaintiffs' right to equal protection under the Fourteenth Amendment to the Constitution of the United States. Although Defendants have permitted other individuals and groups access to and use of public parks, streets, common grounds and other Village facilities, including Boniface Circle, Defendants have, since November of 1981, unlawfully discriminated against Plaintiffs solely on the basis of the content of Plaintiffs' anticipated speech and religious expression in Boniface Circle.

22. On December 7, 1982, seventeen Village residents collectively submitted an application to the Board of Trustees seeking permission to erect and display a creche in Boniface Circle during the 1982 Christmas holiday season. The application represented that by erecting and displaying a creche, these residents sought to celebrate and express their religious convictions. In their application and in statements made to the Board of Trustees at a meeting held on December 14, 1982, these residents stated that they would be responsible for all work and costs involved in erecting, displaying and removing the creche. They also offered to affix a sign to the creche which would state that the creche was privately owned and that the Village did not support or sponsor its display.

23. On December 14, 1982, the Board of Trustees voted 4-3 to deny these seventeen residents permission to erect and display a creche in Boniface Circle. The denial of these residents' application by the Board of Trustees was not based upon any statute, ordinance, rule, regulation or standards governing access to or use of Boniface Circle.

24. Upon information and belief, the Board of Trustees arbitrarily and capriciously denied the application described in Paragraph 23 above solely on the basis of the content of these residents' anticipated speech and religious expression in Boniface Circle.

25. On April 12, 1983, the Committee submitted an application to the Board of Trustees seeking permission to erect and display its creche in Boniface Circle during the 1983 Christmas holiday season. The application represented that, as in prior years, the Committee would display the sign referred to

in Paragraph 14 above and would be responsible for all work and costs involved in erecting, displaying and removing the creche. The Committee requested that the Board of Trustees consider its application at the board meeting scheduled to be held on April 26, 1983.

26. By letter dated April 21, 1983, the Board of Trustees advised the Committee that in view of the fact that the question of allowing the placement of a creche in Boniface Circle is now the subject of a pending lawsuit, it would not consider the Committee's application "until the progress of the litigation is clearer".

27. By acting under color of state law to deny Plaintiffs and others similarly situated access to and use of Boniface Circle to erect and temporarily display a creche, Defendants have deprived and unless restrained, will continue to deprive Plaintiffs of their rights to freedom of speech, free exercise of religion and equal protection, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

28. The damage and injury done to Plaintiffs by reason of being deprived of the aforesaid rights is continuing and irreparable and Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Adjudge and declare Defendants' policy, practice, custom or usage of denying Plaintiffs access to and use of Boniface Circle solely on the basis of the content of Plaintiffs' anticipated speech and religious expression in that public forum to be in violation of the First and Fourteenth Amendments to the Constitution of the United States; and

2. Issue a preliminary and permanent injunction restraining Defendants, their agents, employees, successors and all persons acting in concert or cooperation with them (a) from denying Plaintiffs access to and use of Boniface Circle solely on the basis of the content of Plaintiffs' anticipated speech and religious expression in that public forum, (b) denying Plaintiffs equal access to and use of Boniface Circle solely on the basis of the content of Plaintiffs' anticipated speech and

religious expression in that public forum and (c) adopting and enforcing any statute, law, ordinance, regulation, policy, practice, custom or usage which prohibits, restricts, limits or unlawfully discriminates against Plaintiffs in the exercise of their rights to freedom of speech and religious expression in public forums in Scarsdale;

3. Grant Plaintiffs against the Village the costs of this action, including reasonable attorneys' fees, pursuant to Title 42, United States Code, Section 1988; and

4. Grant such other and further relief as this Court may deem just and proper.

Dated: New York, New York
April 28,1983

Respectfully submitted,

Marvin Schwartz

Sara Goodman

Attorneys for Plaintiffs
125 Broad Street
New York, New York 10004
(212) 558-4000

ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED IN PRINTING]

Defendants Village of Scarsdale and Board of Trustees of the Village of Scarsdale, by their attorneys, Siff & Newman, P.C. and Kramer, Levin, Nessen, Kamin & Frankel, as and for their answer to the complaint allege upon information and belief as follows:

1. Neither admit nor deny the allegations contained in paragraph 1 to the extent that these allegations state conclusions of law and deny the remaining allegations contained therein.

2. Neither admit nor deny the allegations contained in paragraph 2 to the extent that these allegations state conclusions of law and deny the remaining allegations contained therein.

3. Neither admit nor deny the allegations contained in paragraph 3 to the extent that these allegations state conclusions of law except admit that the acts alleged in the complaint occurred within the Southern District of New York.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.

5. Deny the allegations contained in paragraph 5 except to admit that defendants are the Village of Scarsdale, a municipal corporation located in Westchester, State of New York, and the Board of Trustees of the Village of Scarsdale, and that the parks and streets and other public properties located in the Village, including Boniface Circle, are under the jurisdiction, management and control of the Village of Scarsdale of which the Board of Trustees is the governing body.

6. Deny the allegations in paragraph 6, except admit that the Village of Scarsdale and its Board of Trustees have permitted, upon application, access to Village parks and streets for various lawful requested purposes.

7. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 that the display of Christmas lights and ornaments is a traditional means by which the Chamber of Commerce celebrates and/or communicates Christmas holiday sentiments and otherwise admit the allegations contained in paragraph 7.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 that the display of a Christmas tree in Davis Park is a traditional means by which the Arthur Manor Community Association celebrates and/or communicates Christmas holiday sentiments and otherwise admit the allegations contained in paragraph 8.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 that the display of a Christmas tree in Village Hall is a traditional means by which the Village and its employees celebrate and/or communicate Christmas holiday sentiments and otherwise admit the allegations in paragraph 9.

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10, except admit that the Village of Scarsdale has not objected to the use of public property for the purpose of a Christmas carol sing one afternoon or evening before Christmas.

11. Deny the allegations contained in paragraph 11 except admit that the Village of Scarsdale has upon request permitted access to and use of Chase Park by the Boy Scouts of America and the Scarsdale Art Association, for various lawful requested purposes including art shows and camping and that the American Legion and the Boy Scouts of America have been permitted access to and use of Boniface Circle for purposes relating to its status as a War Memorial.

12. Deny the allegations contained in paragraph 12 except admit that from 1957 through 1980 the Committee was given access to Boniface Circle for the purpose of erecting and displaying its wood-carved creche during December and January, and that the Committee was exclusively responsible for

erecting and removing the creche and restoring Boniface Circle to its previous condition after the creche was removed.

13. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 except admit that from 1976 through 1980, in response to and in compliance with a resolution passed by the Board of Trustees in 1976, the Committee displayed a sign beside the creche which stated, "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization."

14. Admit the allegations contained in paragraph 14 that the Committee submitted application to the Board of Trustees seeking permission to erect and display its creche on Boniface Circle during the 1981 Christmas season and that the application stated that "all conditions set up in past years will be followed."

15. Deny the allegations contained in paragraph 15 except admit that on November 19, 1981, the Board of Trustees voted 4-3 to deny the Committee's application.

16. Admit the allegations contained in paragraph 16 that the Committee submitted an application to the Board of Trustees seeking permission to erect and display its creche on Boniface Circle during the 1982 Christmas holiday season and that the application stated that: "All conditions set up over the past years will be carried out by the committee."

17. Deny the allegations contained in paragraph 17 except admit that on December 1, 1982, the Board of Trustees voted 4-3 to deny the Committee's application.

18. Deny knowledge of information sufficient to form a belief as to the truth of allegations contained in paragraph 18 except admit that the creche is a religious symbol.

19. Deny the allegations contained in paragraph 19.

20. Deny the allegations contained in paragraph 20.

21. Deny the allegations contained in paragraph 21.

22. Admit the allegations contained in paragraph 22.

23. Deny the allegations contained in paragraph 23, except admit that on December 14, 1982 the Board of Trustees voted

4-3 to deny the application made by 17 residents to display and erect a creche in Boniface Circle.

24. Deny the allegations contained in paragraph 24.

25. Admit the allegations contained in paragraph 25 that the Committee submitted an application to the Board of Trustees seeking permission to erect and display its creche on Boniface Circle during the 1983 Christmas season, that the application stated that "all conditions required during the past years will be met," and that the Committee requested that the application be considered at the board meeting scheduled for April 26, 1983.

26. Admit the allegations contained in paragraph 26 that the Board of Trustees by letter dated April 21, 1983, advised the Committee that:

> "The Board, whatever its individual views on the merits, is unanimous in the hope that this divisive issue will be resolved in the courts. Litigation is, of course, prolonged but we hope this case will be expedited. Accordingly, until the progress of the litigation is clearer, it does not seem appropriate to add your request to the Board's agenda at this time."

27. Deny the allegations contained in paragraph 27.

28. Deny the allegations contained in paragraph 28.

FIRST DEFENSE

29. The complaint fails to state a claim upon which relief may be granted against the defendants.

SECOND DEFENSE

30. The granting of permission by the defendants to the plaintiffs to place a creche on Boniface Circle in order to give recognition to the birth of Jesus Christ and to celebrate and express religious convictions would have been in violation of the First and Fourteenth Amendments to the Constitution of the United States in that such action by the defendants would

not reflect a clearly secular purpose and would have constituted the use of public property in support of religion and for religious purposes.

THIRD DEFENSE

31. The granting of permission by the defendants to the plaintiffs to place a creche on Boniface Circle in order to give recognition to the birth of Jesus Christ and to celebrate and express religious convictions would have been in violation of the First and Fourteenth Amendments to the Constitution of the United States in that said action by the defendants would have had the impermissible effect of advancing religion and would have constituted the use of public property in support of religion and for religious purposes.

FOURTH DEFENSE

32. The granting of permission by the defendants to the plaintiffs to place a crech on Boniface Circle in order to give recognition to the birth of Jesus Christ and to celebrate and express religious convictions would have been in violation of the First and Fourteenth Amendments to the Constitution of the United States in that such action by the defendants would have constituted excessive government entanglement with religion.

WHEREFORE the Court is respectfully requested to:

(1) dismiss the complaint in its entirety against the defendants the Board of Trustees of the Village of Scarsdale and the Village of Scarsdale;

(2) issue a judgment declaring (i) that the denial by the Board of Trustees of the Village of Scarsdale of plaintiffs' applications to erect a creche at Boniface Circle was not in violation of the Constitution of the United States or any other law, and (ii) that approval by the Board of Trustees of the Village of Scarsdale of plaintiffs' applications to erect a creche at Boniface Circle would have violated the First and Fourteenth Amendments of the Constitution of the United States;

(3) grant defendants such other relief as the Court may deem appropriate; and

(4) award defendants their costs, disbursements and attorneys' fees in this action.

Dated: New York, New York
May 27, 1983

SIFF & NEWMAN, P.C.

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Attorneys for Defendants

STIPULATION OF FACTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED IN PRINTING]

The parties to the above-captioned actions hereby stipulate to the facts set forth below. Attached hereto and made a part of this Stipulation is an Appendix of documents referred to in the paragraphs of stipulated facts. The parties do not dispute the authenticity of any of the documents contained in the Appendix. The parties have also agreed that all deposition transcripts may be offered into evidence as if the deponents were testifying at trial. Answers to interrogatories in these actions also may be offered into evidence.

All parties reserve their rights to object to the admissibility of any stipulated facts, exhibits, portions of depositions or interrogatory answers on the grounds of relevance and materiality.

1. The Court has jurisdiction over the subject matter of Civil Action No. 83 Civ. 0987 and Civil Action No. 83 Civ. 3266 under 28 U.S.C. § 1331, 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983.

2. Plaintiffs in Civil Action No. 83 Civ. 0987 are Kathleen S. McCreary, David Drabkin, Ann F. Cawley, Angelina J. Messenger, Edward R. Napolitano, Charles E. Butler, John D. Hawkins, Nancy G. Steger, Richard Cacciato, Carol Ann Pascal, Mary T. Thompson and Gregory De Sousa (the "Citizens Group").[1] These plaintiffs are citizens of the United States and 11 are now residents of the Village of Scarsdale. Since the filing of the Complaint in this action, plaintiff Pascal moved from Scarsdale.

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1 The term "Citizens Group" is also sometimes used in this Stipulation to describe the 17 residents who applied to display a creche in Boniface Circle on December 7, 1982.

3. Plaintiffs in Civil Action No. 83 Civ. 3266 are The Scarsdale Creche Committee, Patricia Curran, Cynthia Barsuhn, Grace Fellows, Doris Adler, Mary Tully, Joan Mann and Maria Pedulla. The seven individual plaintiffs are citizens of the United States and five plaintiffs are residents of the Village of Scarsdale. All of the individual plaintiffs have a "Scarsdale, N.Y." post office address. These plaintiffs are hereinafter collectively referred to as the "Creche Committee".

The Creche Committee is a private unincorporated association of seven Protestant and Catholic churches. These seven churches are Immaculate Heart of Mary, Trinity Lutheran, Church of the Good Shepherd, Grace Lutheran, Church of St. Pius, Scarsdale Community Baptist and Our Lady of Fatima. Five of these churches are located in the Village of Scarsdale. Grace Lutheran is located in Eastchester and Our Lady of Fatima is located in Yonkers. Both have a "Scarsdale, N.Y." post office address.

The Creche Committee formed in 1957 for the purpose of commissioning the sculpting of a wood-carved creche to be displayed in the Village of Scarsdale during the Christmas seasons. The creche consists of a wooden frame approximately 6 feet high at the tallest point, dropping off on both sides to about 3-1/2 feet. It is approximately 9 feet long and 3 feet deep. The inside of the frame is covered with an oil painting. Placed inside the wooden frame are nine hand-carved wooden figures which were sculpted in 1958 by Robert Robbins, an artist from Scarsdale, at a cost of approximately $1,625.00. The carved figures portray the birth of Jesus Christ. The figures range in height from approximately 6-1/2 inches– 3-1/2 feet.

Each church contributes approximately $25 annually to the Creche Committee to defray the costs of displaying and maintaining the creche. Each of the seven individual plaintiffs represents a church on the Creche Committee. Plaintiff Curran is Chairman of the Creche Committee.

4. The two defendants common to Civil Action No. 83 Civ. 0987 and Civil Action No. 83 Civ. 3266 are the Village of Scarsdale ("Scarsdale" or the "Village"), a municipal corporation located in the County of Westchester, State of New York and the Board of Trustees of Scarsdale, the governing body of the Village.

5. The four individual defendants named in Civil Action No. 83 Civ. 0987 who are not named in Civil Action No. 83 Civ. 3266 are Jean Stone, Elisabeth M. Brown, Edward Falkenberg and Beatrice K. Underweiser. Jean Stone formerly served as Mayor of Scarsdale during 1981, 1982 and during the period from January 1, 1983 to April 4, 1983; she served as a Trustee of Scarsdale during 1979, 1980, 1981, 1982 and during the period from January 1 to April 4, 1983. Elisabeth M. Brown formerly served as a Trustee of Scarsdale during 1979, 1980, 1981, 1982 and during the period from January 1 to April 4, 1983. Edward Falkenberg served as a Trustee of Scarsdale during 1981, 1982 and currently serves as a Trustee. Beatrice K. Underweiser served as a Trustee of Scarsdale during 1980, 1981, 1982 and currently serves as a Trustee.

6. The Village and the Board of Trustees (the "Board") have under their jurisdiction, management and control the parks, streets and other public properties and facilities located in Scarsdale.

Lowell J. Tooley has been employed as Scarsdale's Village Manager since April, 1961. Mr. Tooley was employed as Scarsdale's Assistant Village Manager from February, 1956 to April, 1961.

7. Boniface Circle, originally known as Tower Circle, was acquired from the Scarsdale Improvement Corporation on March 26, 1931. The Deed to the Village is Exhibit 1 in the Appendix to this Stipulation.[2]

8. Beginning in 1956, at the request of four Scarsdale churches (St. Pius X, Immaculate Heart of Mary, the Lutheran Church and St. James the Less Church) the Board of Trustees of the Village of Scarsdale granted permission to place a

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2 References to documents contained in the Appendix are cited hereinafter as "(Ex.)".

creche on Boniface Circle (Ex. 2). In each year from 1957 through 1982, the Creche Committee submitted a written application to the Board seeking permission to display its creche at Boniface Circle during the Christmas season. In each year from 1957 through 1980, the Board granted the Creche Committee's application for permission to display the creche at Boniface Circle. In 1981 and 1982, the Board voted 4-3 to deny the Creche Committee's applications. Copies of those applications which are still available and those portions of the minutes of the meetings of the Board which reflect the discussions, grants and denials of the Creche Committee's applications are Ex. 3-28.

9. The Creche Committee's requested duration of the creche display was as follows:

(a) Until 1980, the applications did not specify a duration for the display. They requested only that the creche be displayed during the Christmas season.

(b) In 1980 and 1981, the application by the Scarsdale Creche Committee requested that the creche be allowed from December 17 to be removed "as soon as possible after the New Year."

(c) In 1982, the request by the Scarsdale Creche Committee sought permission from December 16, 1982 to be removed "as soon as possible after the New Year."

(d) In 1983, the request of the Scarsdale Creche Committee was for the 1983 Christmas season.

10. The voting of the Board of Trustees on the Creche Committee's applications from 1957 to 1982 was as follows:

1957-1972—Unanimous approval by the Trustees

	Ayes	Nays	Abstentions	Absent
1973—	Steyer*		Szabad	
	Finney			
	Hackett			
	Heming			
	Hodges			
	Johnson			
1974—	Steyer*		Szabad	Kahn
	Brennan			
	Heming			
	Hodges			
	Johnson			
1975—	Johnson*	Richman	Szabad	
	Brennan			
	Heming			
	Jensen			
	Kahn			
1976—	Johnson*	Richman		Szabad
	Brennan			Kahn
	Gordon			
	Jensen			
1977—	Szabad*	Richman		
	Jensen			
	Brennan			
	Browning			
	Gordon			
	Kahn			
1978—	Szabad*	Richman		
	Browning	Sims		
	Jensen			
	Stone			
	Gordon			

1979—By a vote of 5-1, with Trustee Sims voting nay, permission was granted.

	Ayes	Nays
1980—	Jensen*	Sims
	Brown	Stone
	Browning	Underweiser
	Ullman	
1981—	Brown	Stone*
	Bowen	Sims
	Ullman	Falkenberg
		Underweiser
1982—	Brown	Stone*
	Ullman	Brown
	Glendon	Falkenberg
		Underweiser

*Also Mayor

11. In each year from 1957 through 1980, the Creche Committee neither solicited nor received any funds from the Village in connection with the storage, erection, display or removal of the creche.

12. In each year from 1957 through 1980, the Creche Committee neither solicited nor received any assistance or support from the Village in connection with the storage, erection or removal of the creche. In some years prior to 1977, a 40-watt incandescent light bulb within the creche was connected at night to a municipal light standard at Boniface Circle.

13. In each year from 1958 through 1980, the Creche Committee restored Boniface Circle to its previous condition after the creche was removed.

14. In each year from 1976 through 1980, the Board, in granting permission to display the creche, required the Creche Committee to display a sign beside the creche which stated "This creche has been erected and maintained solely by the

Scarsdale Creche Committee, a private organization". The Board did not specify the size of the sign it required.

In each year from 1976 through 1980, the Creche Committee complied with the Board's sign requirement. The sign which the Creche Committee displayed from 1978 through 1980 is Ex. 29.

15. On December 7, 1982, 17 residents of Scarsdale, four of whom are members of the Citizens' Group, submitted an application to the Board seeking permission to display a creche at Boniface Circle during the 1982 Christmas season, specifically from December 18 to December 26, 1982. (Ex. 30).

16. On December 14, 1982, the Board voted 4-3 to deny these 17 residents permission to erect and display a creche at Boniface Circle. The vote was as follows:

Ayes	Nays
Trustee Bowen	Mayor Stone
Trustee Ullman	Trustee Brown
Trustee Glendon	Trustee Falkenberg
	Trustee Underweiser

A copy of that portion of the minutes of the Board's December 14, 1982 meeting which reflects the discussion and denial of that application is contained in Ex. 28.

17. On February 3, 1983, the Citizens' Group submitted an application to the Board seeking permission to display a creche at Boniface Circle during the 1983 Christmas season, specifically from December 17 to December 26, 1983. (Ex. 31).

18. On April 12, 1983, the Creche Committee submitted an application to the Board seeking permission to display its creche at Boniface Circle during the 1983 Christmas season. The Creche Committee requested the Board to consider its application at the Board meeting scheduled to be held on April 26, 1983. (Ex. 32).

19. By letter dated April 21, 1983, Seymour E. Sims, current Mayor of Scarsdale, responded to the Creche Committee that the question of allowing the placement of a creche on Boniface Circle was the subject of a pending lawsuit and

accordingly it was not appropriate to consider the application at that time. (Ex. 33).

20. The following occurred with respect to the placement of a creche at Boniface Circle.

(a) On September 13, 1960, the Scarsdale section of the American Jewish Congress sent a letter to the Board opposing the placement of the creche on Boniface Circle. (See Ex. 6).

(b) In 1961, the Board of Trustees passed a resolution appointing a special committee of three Trustees to study and report to the Board on the issue of the creche at Boniface Circle. (See Ex. 7).

(c) At the October 23, 1962 Board meeting, the Special Committee appointed by the Board made its report on the subject of the creche. (See Ex. 8).

(d) At the executive session of the Board meeting on October 23, 1962 Trustee Hunger reported that the Special Committee appointed considered the creche issue with various groups and recommended that permission be granted that year. (See Ex. 8).

(e) By letter dated January 8, 1963, the President of the Scarsdale Chapter of the American Jewish Congress sent a letter to the Board opposing the display of the creche on Village property. (See Ex. 9). At the next Board meeting, Trustee Hunger stated he had also received letters from the Chairman of the American Jewish Congress and from the Chairman of the American Jewish Committee both requesting a meeting. In response, the Board suggested a meeting with Dr. Giles, a professor at NYU in the field of Human Relations, between representatives of the special committee of the Board and the American Jewish Congress and the American Jewish Committee. (Ex. 9).

The special committee of the Board requested Dr. Giles to "conduct an informal meeting for the clarification of various points of disagreement on the location of a Christmas Creche in Boniface Circle." (See Ex. 9). At the request of Dr. Giles a meeting was held on March 28, 1963 at the Fire House. Representatives of the most divergent views were invited. (See Ex. 9).

(f) On December 4, 1975 Nettie Breines sent a letter to the Board opposing the placement of the creche on Boniface Circle. (Ex. 34). The Assistant Village Manager by letter dated December 12, 1975 to Ms. Breines noted the Mayor's comment to the Board. (Ex. 35).

21. On October 6, 1976 Leonard H. Rubin, an attorney and resident of Scarsdale, wrote a letter to John F. Holden, Jr., the Village Attorney, stating that if Mr. Holden concluded that the Village could permit the creche to be erected on Village property, he would commence litigation. (Ex. 36).

22. On December 15, 1976, Mr. Rubin commenced an action against the Village of Scarsdale and the Creche Committee in the United States District Court, Southern District of New York seeking: (a) a declaration that the placement of the creche on Village-owned park land was unconstitutional, and (b) an injunction against the Village of Scarsdale prohibiting the Board of Trustees from permitting the erection of a creche on Village-owned land in the future. Judge Ward dismissed the suit on the ground that the Court lacked subject matter jurisdiction. (*Rubin v. Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1976)).

Copies of the amended complaint, the answer, the Village's summary judgment papers and the Court's opinion are Ex. 37-40.

23. On November 10, 1976, five churches wrote to the Board of Trustees to offer the use of their property to the Creche Committee on a rotating basis for the annual display of the Creche. (Ex. 41).

24. The Creche Committee was aware of this offer from the years 1976 to until at least 1982. At the November 23, 1976 Board meeting, the November 10 letter suggesting that it might be more appropriate to have the creche rotated among church properties in the Village was noted. (See Ex. 22).

25. On November 18, 1976, the Immaculate Heart of Mary Church wrote a letter opposing removal of the creche at Boniface Circle. (Ex. 42).

26. In 1960, the Creche Committee was comprised of representatives from eleven local churches: Scarsdale Baptist,

Scarsdale Congregational, Grace Lutheran, Trinity Lutheran, Immaculate Heart of Mary, Our Lady of Fatima, Pope Pius X, Greenville Community, St. James the Less, Church of the Good Shepherd and Hitchcock Presbyterian Church.

27. Since 1976, the Scarsdale Congregational Church, Greenville Community Church, Hitchcock Presbyterian Church and the Church of St. James the Less no longer were represented on the Scarsdale Creche Committee.

28. In 1976, the Scarsdale Human Relations Advisory Council was asked by the Village Manager on behalf of the Board to give its "appraisal of how the population of Scarsdale feels about using Boniface Circle for locating the creche." (Ex. 43). The Advisory Council was established by the Board for the purpose of advising the Board with regard to any human relations issues which might arise in Scarsdale. The members of the Advisory Council are appointed by the Board.

29. From 1976 to 1982 the Advisory Council made recommendations to the Board of Trustees regarding the creche:

(a) From 1976 to 1978 the Advisory Council recommended that in the interests of community relations, permission be granted to the Creche Committee. (Ex.44-45).

(b) From 1980 to 1982, the reports stated that it was the Advisory Council's belief that the creche should be placed on non-public property and it urged the Creche Committee to seek other sites; it also recommended, that in the interests of community relations permission be granted to the Creche Committee to use Boniface Circle. (Ex. 46-48).

30. While granting permission to the Creche Committee to erect its creche at Boniface Circle in 1979, "It was strongly recommended by all the Trustees that the Creche Committee consider rotating the creche among various Village churches in future years." (Ex. 49).

31. In 1980, the Board granted the request of the Creche Committee. The Village's letter to the Creche Committee stated that "Mayor Jensen pointed out that in light of the division caused by this issue, the Board strongly urges that next year the Committee erect the creche at a location other than Village-owned property." (Ex. 50).

32. On May 29, 1980, Plaintiffs Curran, Barsuhn, Mann and Theresa Vohnout, Treasurer of the Creche Committee, met with members of the Advisory Council to discuss and consider possible alternative locations for the creche. Two locations, the Frog Prince Proper restaurant and the Manhattan Bank for Savings were discussed. The Creche Committee was later advised by the Advisory Council that these locations were not available.

33. In November, 1981, after permission by the Board to place their creche on Boniface Circle was denied, the Creche Committee was offered the grounds of the "Frog Prince Proper" restaurant for the display of their creche in 1981. The Creche Committee accepted the offer and erected their creche at the Frog Prince Proper restaurant on December 17, 1981.

34. In March, 1982, the Creche Committee representatives met with former Mayor Jean Stone, the Village Trustees, Village Manager Lowell J. Tooley, members of the Advisory Council, members of the Chamber of Commerce and members of the Scarsdale Police Department to discuss the concept of establishing a "Heritage Plaza" in Scarsdale. The concept was to make an area of land available for displays of a patriotic, ethnic, charitable or religious nature as well as for such uses as folk dancing, singing and other social and cultural activities. Chase Park was discussed at the March meeting as a location for the "Heritage Plaza". Because Chase Park is Village-owned it was proposed at that meeting that Scarsdale would submit a bill to the New York State Legislature authorizing the transfer to a private entity of a portion of Chase Park. The Creche Committee representatives stated that they were in favor of the proposal and in favor of displaying the creche at Chase Park because it is centrally located and accessible to pedestrians. Mayor Stone recommended that the bill which had been introduced, be permitted to die in Committee on the advice of Assemblyman Gordon Burrows' office. This advice was that because of opposition to the bill, including from the A.C.L.U., "a very large and ugly floor fight loomed ahead in the State Legislature." (Ex. 51).

35. In June, 1982, Mayor Stone wrote a letter to Dr. Howard Goldin on the subject of the creche which was copied to the other members of the Board of Trustees, Lowell J. Tooley, the Village Manager and John F. Holden, Jr., the Village Attorney. (Ex. 52).

36. The November 23, December 1 and December 14, 1982 Board minutes contain detailed statements by the Board of Trustees with respect to the creche applications of the Scarsdale Creche Committee and the Citizens Group. (See Ex. 28).

(a) Prior to the meeting on December 1, 1982 Mayor Stone requested Trustee Glendon and the Law Committee to deliver a report as to the course of action the Board should take with respect to the display of the creche during the 1982 Christmas season. After submission of Trustee Glendon's memorandum, Trustee Underweiser and two persons not associated with the Village government submitted memoranda concerning the display of the creche. These four memoranda are Ex. 53-56.

(b) Trustee Ullman as chairman of the Law Committee did not submit a written report to the Board. At the December 1, 1982 special Board meeting to consider the Creche Committee's request, Trustee Ullman advised the Board that no unanimity could be reached by members of the Law Committee and it was not in a position to give "a clear direction" to the Board.

(c) In preparation for speaking at the December 1, 1982 Board meeting, Trustee Ullman prepared 7 pages of handwritten notes on the issue of the display of the creche. (Ex. 57). Trustee Ullman has identified Ex. 58 as an accurate type-written version of these notes.

37. After the Creche Committee was denied permission to display the creche at Boniface Circle, it learned that Mr. Durning, owner of the former "Frog Prince Proper" restaurant at 28 Chase Road was offering this site for the display of the creche during the 1982 Christmas season. Plaintiff Curran received a letter dated December 5, 1982 from the Scarsdale Congregational Church offering its property for the display of the creche. Plaintiff Mann learned that her church, the Scarsdale Community Baptist Church, was offering the use of its

property to the Creche Committee. The Creche Committee declined to accept the offers.

(a) *Scarsdale Congregational Church (United Church of Christ)*

The Scarsdale Congregational Church is located at the junction of Heathcote, Post, Drake and Crane Roads. Village Hall is also located at this intersection. The church property extends to a narrow pitched peninsula from land that abuts both the Post Road and Heathcote Road, where there are no sidewalks. The outline of buildings on the church property are shown on the attached map. (Ex. 59). Building "1" is Dyckman Hall, a multi-purpose building used for a wide spectrum of activities including religious activities sponsored by the church and secular activities sponsored by groups unaffiliated with the church. The Congregational Church did not specify in its offer where the creche could be located and the Creche Committee did not ask where the creche could be placed.

The Village lamp posts within half a mile of the Church are not decorated with Christmas lights or other decorations. There are no sidewalks. There is extensive free parking nearby for those who wish to park their car and physically visit the creche. Photographs of the site are Ex. 60.

The intersection at which the Congregational Church is located is one of the most trafficked in Scarsdale.

(b) *The Frog Prince Proper Restaurant*

The site offered in 1982 is the same site where the Creche Committee's creche was prominently displayed in December 1981. This is a flat area in front of the restaurant across the street from Boniface Circle.

(c) *Scarsdale Community Baptist Church Site*

The Baptist Church is located on Popham and Autenrieth Roads. Attached as Ex. 61-a is a topographic map which shows the church building marked as "1". The Village lamp

posts within one block of the Church are not decorated with Christmas lights or other decorations. Photographs of the site are Ex. 61-b. The Scarsdale Creche Committee was not told of the proposed site and did not ask where the creche could be placed.

38. Publicly owned facilities other than Boniface Circle were never offered to or requested by the Creche Committee or the Citizens Group for the purposes of their applications to display a creche in 1981 or 1982.

39. Letters to the Mayor and the Trustees, and Editors, on the display of the creche at Boniface Circle expressed diverse viewpoints. Ex. 62 contains letters in chronological order from Scarsdale residents opposed to the placement of a creche on public property.

Ex. 63 contains letters in chronological order from Scarsdale residents in favor of the placement of a creche on public property.

Ex. 64 contains letters in chronological order from the plaintiffs.

Ex. 65 contains letters in chronological order from non-residents and letters that are unsigned.

40. Local newspaper treatment of the subject of the creche from 1976 through 1982 is Ex. 66.

41. (a) Some residents of Scarsdale who are not of the Christian faith are offended by display of the creche on public property because they believe it to favor the Christian religion and to be offensive and hostile to their different beliefs or non-beliefs. Some residents, both Christian and non-Christian, object to the creche because they perceive the placement of this symbol on public property as giving government sanction to, or support an endorsement of, the religious beliefs thus symbolized. Some, both Christian and non-Christian, object because they perceive the creche on public property as mingling government and religion in objectionable fashion.

(b) Some residents of the Village are offended that the Village has denied permission for the erection of the creche at Boniface Circle. Some of those residents view the display of the creche at Boniface Circle as a long standing tradition

signifying dedication to peace and goodwill among men and women everywhere. Others view the creche as a symbol of the religious aspects of Christmas. Some residents view the Village's denial of permission to erect the creche as a denial of their right to express or receive a Christmas message or as an official rejection of the message which the creche brings to them.

42. Listed below are some of the parks and public properties owned by the Village of Scarsdale:

Boniface Circle
Chase Park or Chase Road Park
Davis Park
Butler Field
Crossway Field
Greenacres Field
Hyatt Field
Wayside Cottage
The Island at Depot Plaza (the Railroad Station)
Village Hall
Crossway Fire House
The Public Library
Municipal Swimming Pool Complex
Popham Road Bridge

43. There are eight rules and regulations governing access to and use of the Village's parks and recreation facilities which have been in effect since at least 1979. (Ex. 67).

44. There is no published statute, law, ordinance, rule or regulation in effect in the Village which states that persons wishing to use Village-owned parks or other public properties must first apply for permission from the Board of Trustees. The Village has no published statute, law, ordinance, rule or regulation which contains the standards, guidelines or criteria upon which the Board bases its decision to grant or deny an applicant permission to use Village-owned parks or other public properties. Village Code Section 4-1-2 states as follows:

No person shall interfere with, take or use any of the property of the Village without first obtaining the consent of the Village Manager.

45. Boniface Circle is located in the center of the retail business district of the Village. Boniface Circle is near oval-shaped and is approximately 3,257 square feet in size. Located inside Boniface Circle are an evergreen tree, approximately 30 feet tall, two benches, two lamp posts, dense hedges, a walkway and a flagpole at the southern end in an open grassy area. At the north end of Boniface Circle, there is a memorial to the veterans of World War II which one can reach by climbing down a few steps. Photographs of various views of Boniface Circle are attached as Ex. 68a-m. Ex. 68h-68m were taken on July 6 and July 7, 1983.

46. In 1947, the Board of Trustees formed a Scarsdale War Memorial Committee to decide whether Scarsdale should have a War Memorial. (Ex. 69).

47. In June 1947, the War Memorial Committee presented its findings. (Ex. 70).

48. In a letter to the American Legion dated March 10, 1947, it was suggested that the War Memorial be located at Boniface Circle. (Ex. 71).

49. The matter of the War Memorial was referred to the Public Property and Library Committee which issued a report on September 9, 1947 recommending that the Board of Trustees accept the report of the War Memorial Committee. (Ex. 72).

50. In September 1947, the Board of Trustees passed a resolution, providing for the erection of a War Memorial at Boniface Circle. (Ex. 73).

51. In 1949, a contract was awarded for the construction of the War Memorial. (Ex. 74).

52. Boniface Circle is frequented throughout the year by people.

53. Business and residential properties facing Boniface Circle (Ex. 75a-75c):

(a) Boniface Circle is bounded by Chase Road on the east and Spencer Place on the north.

(b) The businesses abutting these streets and those which "face" Boniface Circle and the site upon which the Creche Committee's creche was displayed are as follows:

Chase Road

(1) There are two buildings here along Chase Road which face Boniface Circle. The first building, which houses the "Chase Landing" restaurant, is directly opposite the place where the Scarsdale Creche Committee's creche was displayed at Boniface Circle. This building is set back from the street and sidewalk and has a slightly raised brick terrace in front of it. Closer to the sidewalk and in an earthen landscaped area with plantings and flower beds is where the Creche Committee's creche was placed in 1981. The "Chase Landing" restaurant is the former "Frog Prince Proper" restaurant.

(2) The other building which abuts Chase Road and overlooks Boniface Circle is known as "45 Popham". This is a six-story building which abuts both Chase Road and, around the corner, Popham Road. Along Chase Road is a row of retail businesses. This one-story area is physically attached to the apartment building. There are three businesses in this building which open onto Chase Road facing Boniface Circle:

a. "Westchester Federal Savings and Loan Association"
b. "Bill's Sporting World"
c. "The Craftsman's Gallery"

There are 63 residential apartments in the 45 Popham building; about 25 of them face onto Chase Road looking out west and north.

The Harwood Building

All of the following businesses are located in a single building known as the Harwood Building. On the first floor of this building facing Boniface Circle there are retail businesses. From the second to the fifth floor in the Harwood Building, there are mainly business and professional offices. There are

no residential units in the Harwood Building. The Harwood Building overlooks Boniface Circle and in a sense surrounds it on two of its sides.

The retail businesses in the first floor of the Harwood Building opening up on Boniface Circle are as follows:

(1) "The Scarsdale Hardware Company, Inc." at the southeast corner.

(2) On the north side of the arcade in the first floor of the Harwood Building is the "Harwood Shoe Repair".

(3) "Wright & Irish Grocery Store" is to the north.

(4) Next is the "Gallery of Art & Antiques".

(5) The last store in the Harwood Building on Boniface Circle is "Lady Budd", a woman's clothing store.

(c) *Spencer Place*

There are businesses which face Boniface Circle from Spencer Place. Only those businesses which are east of the crosswalk "N" in Ex. 75a are listed. The building containing these retail stores is only a single story high.

(1) "County Boy's and Men's Shops, Inc." is opposite the crosswalk.

(2) "Spencer Book House" to the east.

(3) Next is "Scarsdale Shoe Shop".

(4) Next is "Mary Rothman", a woman's dress shop.

(5) Next is "Julia B. Fee, Realtors".

(6) Next is "Young Vogue", a children's clothing store.

(7) The last store in this building is "Lange's Delicatessen".

(8) After a driveway, the last building abutting Spencer Place facing Boniface Circle from the north is the south side of the Scarsdale Post Office.

54. Wayside Cottage is a Village-owned 18th century historic structure located at 1039 Post Road in Scarsdale which was dedicated by the Board of Trustees on April 27, 1976 as a "Historic monument of major significance". (Ex. 76). Wayside Cottage was deeded to the Village in 1919 by Emily O. Butler, "for the purpose of creating an historical park and

for the purpose of fostering a general public and democratic spirit in the community, of providing a center for civic welfare of the village, and for providing a club house, club rooms, or lyceum for the use by people of Scarsdale for such purposes, and for maintaining a museum or reading room thereon . . ." (Ex. 77).

On April 5, 1953, the Village entered into a lease with the Junior League of Scarsdale, pursuant to which the Junior League was permitted use of Wayside Cottage rent-free. The lease provided that the Village would pay for all taxes, assessments, major repairs and major maintenance, and over time the Village has contributed to the maintenance of and capital improvements for Wayside Cottage. Under the terms of the lease, the Junior League was obligated to use Wayside Cottage exclusively for one or more of the following purposes:

(a) Promoting the welfare of the Village of Scarsdale;

(b) Fostering a general public and democratic spirit in the community;

(c) Conducting a center for the civic welfare of the Village;

(d) Maintaining a clubhouse, club rooms or lyceum for the use of the people of Scarsdale;

(e) Maintaining a museum or reading room.

The 1953 lease authorized the Junior League to permit other groups and organizations in Scarsdale to use Wayside Cottage if they were organized for one or more of the purposes set forth above; if a group or organization was not clearly organized for one or more of those purposes, the Junior League was not authorized to permit it to use Wayside Cottage without prior written permission from the Village. The lease also provided that the Junior League was to discontinue permitting use of Wayside Cottage by any group if notified by the Village that the group was not organized for one of the purposes set forth above.

On October 20, 1967, the Junior League renewed its lease with the Village for an additional fifteen-year period on the same terms and conditions contained in the original 1953 lease. For many years, including 1981 and 1982, the Village has provided fuel oil to the Junior League at a reduced rate

available to the Village and otherwise unavailable to the Junior League. The Junior League has, since 1953, acted as custodian of Wayside Cottage, maintaining the premises for Village use.

A new lease dated March 17, 1983 signed by Mayor Stone between the Village of Scarsdale and the Junior League substantially repeats the terms of the original 1953 lease. As before, the Village as lessor agrees to provide various capital expenditures from time to time for the maintenance of and capital improvements to Wayside Cottage.

For some time the Junior League has rented rooms in Wayside Cottage for various private functions.

55. The Scarsdale Public Library, located on Olmstead Road in Scarsdale, is administered by the Library Board which in turn is directly accountable to the Board of Trustees. The "Scott Room" is a separate room area in the Public Library which is available to the public for informational, educational, cultural and recreational uses. The two-page document which is Ex. 78 sets forth the Public Library's policy, regulations and fees which govern the public's use of the Scott Room. The Village contributes to the maintenance of and capital improvements for the Public Library.

56. For many years, including 1981 and 1982, the Village of Scarsdale permitted access to and use of several of the streets located in the Heathcote, Central Business (which includes Boniface Circle) and Garth Road areas of the Village by the Scarsdale Chamber of Commerce for the purpose of installing and displaying Christmas lights and ornaments. The Chamber of Commerce was allowed to display these lights on Village-owned utility poles for approximately one month each year, commencing on or about December 1 and ending shortly after January 1 of the following year. The Chamber of Commerce was not required to seek permission from the Board of Trustees before installing and displaying these lights and ornaments. The Village of Scarsdale did not require the Chamber of Commerce to display signs beside the utility poles to indicate that it was the Chamber of Commerce that installed and displayed the Christmas lights and ornaments. The Village of Scarsdale also permitted the members of the Scarsdale

Chamber of Commerce to broadcast Christmas music in the Heathcote, central business and Garth Road areas during the month of December when the Christmas lights and ornaments were displayed.

57. For many years, including 1981 and 1982, the Village of Scarsdale permitted access to and use of Boniface Circle by the Scarsdale Chamber of Commerce for the purpose of installing and displaying Christmas ornaments. The Chamber of Commerce was allowed to display these Christmas ornaments on the two lamp posts in Boniface Circle for approximately one month each year, commencing on or about December 1 and ending shortly after January 1 of the following year, and on the lamp posts directly surrounding Boniface Circle. The Chamber of Commerce was not required to seek permission from the Board of Trustees before installing and displaying these ornaments. The Village of Scarsdale did not require the Chamber of Commerce to display signs beside the lamp posts to indicate that it was the Chamber of Commerce that installed and displayed the Christmas ornaments.

58. In each of the years 1959, 1962, 1963, 1964, 1965, 1968, 1969, 1970 and 1971, the Village of Scarsdale permitted access to and use of Boniface Circle by the Town Club, a private group of Scarsdale residents, so that the Town Club could celebrate Christmas through a Christmas Carol Sing. Clergymen from local churches offered invocations and benedictions at the Carol Sing in 1959, 1960, 1969 and 1970. In some of the years indicated above, the Village of Scarsdale provided the Town Club with Village-owned loudspeakers for use in connection with the annual Christmas Carol Sing at Boniface Circle. In 1971 the Village picked up and returned platforms to the high school used in connection with the Christmas Carol Sing. In the years indicated above, the Mayor or a member of the Board of Trustees, upon invitation of the Town Club, attended the Christmas Carol Sing and welcomed the Christmas carolers in his or her official capacity. (Ex. 79).

In 1958, the Town Club's Carol Sing was at Chase Road adjoining Boniface Circle. In 1960, the Carol Sing was held at

the High School. In 1966, the Carol Sing was held on Chase Road. In 1967, the Carol Sing was held at Chase Road Park.

59. From 1972 through 1981, the Village of Scarsdale permitted access to and use of the plaza outside the entrance to Village Hall, the seat of Scarsdale's local government, by the Town Club so that the Town Club could celebrate Christmas through its annual Christmas Carol Sing as described in paragraph 58 above. In recent years, the arrival of "Santa Claus" or "Saint Nicholas" on one of the Village-owned fire trucks has been a feature of the Town Club's annual Christmas Carol Sing in front of Village Hall. On December 20, 1981, former Mayor Jean Stone attended the Christmas Carol Sing and welcomed the carolers in her official capacity as Mayor of Scarsdale.

60. On December 19, 1982, the Village of Scarsdale permitted access to and use of Boniface Circle by the Town Club for one afternoon so that the Town Club could celebrate Christmas through its annual Christmas Carol Sing as described in paragraph 58 above. The arrival of "Santa Claus" or "Saint Nicholas" on one of the Village-owned fire trucks was a feature of the Town Club's 1982 Christmas Carol Sing. Elisabeth M. Brown attended the 1982 Christmas Carol Sing and welcomed the carolers in her official capacity as a Trustee and Deputy Mayor of Scarsdale. The Town Club's repertoire of Christmas carols at Boniface Circle in 1982 included the following songs:

The First Noel
It Came Upon The Midnight Clear
Hark The Herald Angels Sing
Oh Come All Ye Faithful
Rock of Ages
Silent Night
O Little Town Of Bethlehem
Joy To the World
We Three Kings
God Rest Ye Merry Gentlemen
Jingle Bells

Hanukah
Deck The Halls
Jolly Old St. Nicholas
Oh Christmas Tree
Angels We Have Heard On High
Rudolph The Red-Nosed Reindeer
Frosty The Snowman
Santa Claus Is Comin' To Town

This repertoire is attached as Ex. 80.

61. For many years, including 1981 and 1982, the Village has permitted access to and use of both the front entrance to and the lobby inside Village Hall by Village employees for the purpose of erecting, decorating and displaying Village-owned Christmas trees. Village employees have been authorized to display these trees at Village Hall for approximately one month each year, commencing on or about December 1 and ending shortly after January 1 of the following year. The cost of electricity has been borne by the Village.

62. In 1982, at the request of the Town Club, the Village permitted access to and use of Boniface Circle by Village employees for the purpose of installing and displaying Village-owned Christmas lights on the large evergreen tree located in the center of Boniface Circle. Village employees were authorized to install and display these Christmas lights on the evergreen tree for approximately two and one-half weeks, commencing on or about December 15, 1982, and ending shortly after January 1, 1983. The cost of the electricity was borne by the Village.

63. For many years, including 1981 and 1982, the Village has permitted access to and use of Davis Park by the Arthur Manor Community Association for the purpose of installing and displaying Christmas lights and ornaments on a large evergreen tree owned by the Village. The Arthur Manor Community Association has not been required to seek permission from the Board of Trustees before displaying these lights and ornaments. The cost of the electricity has been borne by

the Village. The Village has not required the Arthur Manor Community Association to display a sign beside the evergreen tree to indicate that it is the Arthur Manor Community Association that installs and displays the lights and ornaments. In some years, the Arthur Manor Community Association conducted a Christmas Carol Sing on a day prior to Christmas at Davis Park and the Village has permitted use of Village-owned loudspeakers by the Arthur Manor Community Association in connection with the Christmas caroling.

64. For many years, the Village of Scarsdale has permitted access to and use of Boniface Circle, Butler Field and various streets in the Village by The American Legion, the Boy Scouts, the Girl Scouts, members of the clergy and other Scarsdale groups and individuals for the purpose of holding a Memorial Day ceremony and parade. The Memorial Day ceremony and parade are sponsored by Scarsdale Post No. 52 of The American Legion. Members of The American Legion traditionally begin the Memorial Day ceremony by placing a wreath at the War Memorial located at Boniface Circle. A member of the clergy, who varies from year to year, then leads the parade participants in a prayer at Boniface Circle. After the ceremony at Boniface Circle is concluded, the parade units proceed through Village streets to Butler Field for the remainder of the celebration which includes speeches, a "presentation of the colors" by the Scouts, a salute to the flag, songs, prayers, a firing squad salute to the dead and awards. Each year the members of the Village Board are invited by The American Legion to participate in the Memorial Day Parade. Starting in 1964, the Board of Trustees, in accordance with Section 89(32) of the Village Law, authorized the expenditure of up to $250.00 for Memorial Day observances.

65. In 1961, permission was granted to the Town Club to hold a portion of the Fourth of July celebration at Boniface Circle for a salute to the flag and patriotic speeches.

66. For many years, the Village of Scarsdale through the Board or agencies of the Village government has permitted access to and use of the grounds of Village Hall, Chase Park, Depot Plaza, Crossway Field and Village streets by various

individuals and groups for such purposes as speechmaking, demonstrating, participating in silent vigils and distributing petitions and other communications. Among the groups which have been allowed to engage in such demonstrations and silent vigils are SCORE (Student Coalition Opposed to the Radical Establishment), the Vietnam Committee of the Scarsdale High School, the Westchester Committee for a Sane Nuclear Policy, SMART (Students for More Appropriate Responsible Thinking), the Scarsdale Appeal for Peace and United Westchester for Peace.

67. For several years, the Village has been aware that the Junior League permits access to and use of Wayside Cottage by numerous groups and individuals. For example, during the period from 1982 to 1983, the following groups and organizations used the Cottage for activities:

Congregation M'Vakshe Derekh
Bahai Faith Group
Mary Kay Cosmetics
Alcoholics Anonymous
Avon
Scarsdale Ski Club
Ladies of Charity
Scarsdale Woman's Exchange
"TM" Transcendental Meditation Program
Daughters of the American Revolution
Obedience Training Club of Port Chester
Crane-Berkley Association
Bramley Heights Neighborhood Association
Green Knolls Civic Association
Wilmont Woods Association
College of New Rochelle Alumni
Association of American University Women
Scarsdale Woman's Club
Bronxville Manor Association
National Alliance of Homebased Businesswomen
Saw Mill River Kennel Club
Catholic Woman's Club of Eastchester

Greenacres Association
Westbrook Junior College
Hamilton College Westchester Association
Juvenile Law Education Project

Congregation M'Vakshe Derekh and the Bahai Faith Group have used Wayside Cottage for religious services. Wayside Cottage has also been used for a Catholic Mass, a Unitarian wedding ceremony, Bar Mitzvahs and religious services by the Bet Ami Conservative Synagogue. As reported in the June 23, 1983 edition of the Scarsdale Inquirer, Congregation M'Vakshe Derekh was holding its regular Sabbath services at Wayside Cottage. (Ex. 81).

68. For several years, the Village has been aware that the Scarsdale Public Library permits access to and use of the Library's "Scott Room" by numerous groups for such purposes as speeches, lectures, workshops, classes, films, music recitals, seminars, meetings, receptions, panel discussions, book fairs, luncheons and concerts. Among the groups which have been permitted access to and use of the "Scott Room" for the above-described purposes from June 1981 through May 1983 are:

Congregation M'Vakshe Derekh
Planned Parenthood of Westchester
Westchester Educational Brokering Service
Scarsdale Antiques Running Club
Philharmonic Symphony of Westchester
Musica da Camere
Friends of Scarsdale Public Library
Scarsdale Cultural Center
Williams Enterprises
Scarsdale Adult School
Scarsdale Hadassah
Scarsdale/Hartsdale United Nations Association
Drexel Burnham Lambert, Inc.
National Council of Jewish Women
Scarsdale Historical Society
Scarsdale Phi Beta Kappa
University of Pennsylvania Alumni
Town Club
Westchester Association for Special Educators

American Jewish Congress
Scarsdale Audubon Society
Archaeological Institute of America
Harvard-Radcliffe Club
Westchester Assoc. for Children with Learning Disabilities
Scarsdale Civic Club
United Jewish Appeal-Federation
Scarsdale Democratic Town Committee
Scarsdale Art Association
United Way
Scarsdale Citizens' Non-Partisan Campaign Committee
Gannett Westchester Newspapers
Wellesley-in-Westchester
Scarsdale Women's Republic Committee
National Society of the Daughters of the American Revolution
Westchester County Psychological Association
Scarsdale Family Counseling Service
National Organization of Women
Fox Meadow Association
University of Pennsylvania Westchester Alumni
Georgetown University Alumni
Merrill Lynch
Scarsdale Seniors
Animal Welfare League
Pasternack Securities Corp.
Mental Health Assoc. of Westchester
Bryn Mawr College Alumnae Club of Westchester
Brandeis University National Women's Committee
Calligraphy Guild
League of Women Voters
Center for Preventative Psychiatry
Westchester-Putnam Group of the Sierra Club
Westchester Smith Club
Student/Alumni Assoc. of Empire State College
Thomson McKinnon Securities, Inc.
Alliance Francaise of Westchester, Inc.
The Broadway Workshop

The Village has been aware that the Scarsdale Public Library permits access to and use of the Library "Scott Room" and other rooms in the Library by individuals and groups for the purpose of exhibiting and displaying articles of an artistic, scientific, literary, civic, cultural, religious or educational

nature. Among the articles which groups have been permitted to exhibit and display in the Library are books, miniature military figures, "Tramp Art", Santa Claus dolls from around the world, rare stamps and Hanukah menorahs.

69. Prior to the December 1982 meeting Mayor Stone received a letter from Dorothy S. Patterson, a former resident of Scarsdale dated November 20, 1982 which is Ex. 82. This letter deals with Wayside Cottage and the Scarsdale Public Library in the context of the Creche Committee's creche and indicates it was copied to the Board of Trustees. Memoranda to the Village Manager from John F. Holden, Jr. and Richard J. Rohan concerning the subject are Ex. 83.

70. For many years, the Village has permitted access to and use of Butler Field, Davis Park, Crossway Field and Greenacres Field by the Greenacres Association, the Arthur Manor Community Association and the East Scarsdale Association for the purpose of holding Fourth of July celebrations which have traditionally included fireworks, parades and speeches.

71. For many years, the Village has permitted access to and use of Butler Field by the Town Club for the purpose of presenting its annual "Music on the Green" concert.

72. For many years, the Village has permitted access to and use of several of Scarsdale's parks and streets by local churches and neighborhood associations, for the purpose of holding church picnics and block parties. For example, Crossway Field has been used for picnics by the Congregational Church, the Hitchcock Presbyterian Church, the Scarsdale Synagogue Youth Group and the Mormon Church. Immaculate Heart of Mary Church and St. Pius X have had block parties and streets closed for social affairs. No church or neighborhood association has applied for permission to use Boniface Circle for these purposes.

73. In 1958, the Board considered the first request of the American Red Cross for permission to erect 3 wooden crosses at Depot Plaza, Boniface Circle and the small island at Drake, Heathcote and Post Roads.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

"RESOLVED: that the American Red Cross is hereby authorized to place a cross as described in the communication dated February 9, 1958, in the island at Depot Plaza, subject to the approval of the Village Manager and Without floodlights. The Village Clerk was requested to inform the American Red Cross that the Board felt that it could not grant permission for the erection of crosses at the other two locations since it would set a precedent and requests from similar organizations could not reasonably be denied." (Ex. 84).

74. In each of the years 1958 to 1973, 1975, 1977 and 1978, the Red Cross applied for access to and use of Depot Plaza, Village-owned property near the Railroad Station, or the Popham Road Bridge, for the purpose of calling public attention to the Red Cross's annual fund drive in March. The Board granted these applications. The Red Cross's use of Village-owned property included the erection of red wooden crosses and Red Cross banners. In each of the years 1958 to 1961, the Red Cross was permitted to erect and display its red wooden cross for two weeks. In each of the years 1962 to 1973, 1977 and 1978, the Red Cross was permitted to erect and display its red wooden cross for one month. In 1975, the Red Cross was permitted to display its banner for one month. (Ex. 84).

75. In each of the years 1955 to 1959, 1961 to 1965 and 1968 to 1982, the Scarsdale Art Association applied for access to and use of Chase Park for the purpose of exhibiting paintings, sculpture and other works of art. The Board granted these applications. (Ex. 85).

76. In 1959, the Scarsdale Art Association requested permission for their art show at Chase Park and to set up easels at Boniface Circle for a one-day period. The Board of Trustees granted permission for the art show in Chase Park. (Ex. 85).

77. In each of the years 1972 to 1978, 1980 and 1982, the American Field Service (the "A.F.S") applied for access to and use of Chase Park, for the purpose of calling public

attention to and raising money for the A.F.S.'s sponsorship of foreign exchange students. The Board granted these applications. The A.F.S.'s use of Chase Park included pumpkin sales and the erection of banners to advertise the pumpkin sales. (Ex. 86).

78. In 1971, the A.F.S. of the Scarsdale High School applied for access to and use of Boniface Circle for the purpose of holding a baked goods sale, a student boutique and an art show for one day. The Board of Trustees granted this application. (Ex. 87).

79. In 1972, the A.F.S. requested permission to have a carnival in Boniface Circle. "The Mayor stated that the Board has considered this request and is of the opinion that because of shopping, parking, traffic, etc. it is not possible to authorize use of Boniface Circle." (Ex. 86).

80. In each of the years 1963, 1965 to 1967, 1970 to 1976 and 1980 to 1982, the Boy Scouts applied for access to and use of Chase Park for the purpose of calling public attention to the ability of the Scouts to take care of themselves when camping. The Board granted these applications. The Boy Scouts' use of Chase Park included the erection of tents, signal towers, and stoves. In addition, the Boy Scouts were permitted to set up informational stations to demonstrate first aid, rope-lashing, knot-making, cooking, tower building, bridge building, cardio-pulmonary resuscitation and bandaging. (Ex. 88).

81. In 1957, the Girl Scouts had requested permission to conduct a baked goods sale in Boniface Circle. The Board passed a resolution granting permission to the Girl Scouts to use Chase Road for its baked goods sale based on the Mayor's suggestion that the Village-owned lot on Chase Road might be a safer place. (Ex. 89).

82. In 1959 and 1974, the Girl Scouts applied for access to and use of Chase Park for the purpose of calling public attention to and raising funds for the Girl Scouts' programs. The Board granted these applications. The Girl Scouts' use of Chase Park included bake sales and a demonstration of a typical Scout patrol encampment and the erection of tents and outdoor kitchens. (Ex. 90).

83. In 1975 and 1976, the Salvation Army applied for permission to park its Emergency Disaster Mobile Canteen at Depot Plaza, for the purpose of calling public attention to and raising funds for the Salvation Army's annual Tag Day programs. The Board granted the applications. (Ex. 91).

84. On May 8, 1956, the Board granted permission to the Reconstructionist Synagogue of Westchester to use the Crossway Firehouse for the purpose of conducting worship services on the following dates for the times indicated:

Tuesday, September 4—6:00 p.m. to 8:00 p.m.
Wednesday, September 5—9:00 a.m.to 2:00 p.m.
6:00 p.m.to 8:00 p.m.
Tuesday, September 6—9:00 a.m. to 2:00 p.m.
Friday, September 14—6:00 p.m. to 10:00 p.m.
Saturday, September 15—9:00 a.m. to 7:00 p.m.
(Ex. 92).

85. On September 27, 1960, the Senior High Youth Fellowship of the Scarsdale Community Baptist Church applied for permission to use Chase Park for a baked goods sale, for the purpose of calling public attention to and raising funds for the International Christian Youth Exchange Programs' sponsorship of a German exchange student. The Board granted the application. (Ex. 93).

86. In 1961, the Westchester Cancer Committee requested permission for "a five foot sword to be placed in the circle area of the lower Scarsdale Station (where the Red Cross now stands) and another such sword to be placed in Boniface Circle". The following resolution was unanimously adopted by the Board:

"RESOLVED: That the Crusade for Cancer in Scarsdale is hereby authorized to place a 5 foot sword in the island at Depot Plaza for a period of 2 weeks during April, subject to the approval of the Village Manager."

(Ex. 94)

87. In 1961, the Scarsdale Community Fund requested permission to launch its annual drive by means of placing a facsimile of a rocketship at Boniface Circle and leaving it there for an 8-day period. The Board passed the following resolution:

"RESOLVED: that the Scarsdale Community Fund is hereby authorized to station a facsimile of a rocketship in the vicinity of the flag pole on Boniface Circle and to release a helium-filled balloon from the nose of said rocketship, on October 21st for the purpose of launching the 1961 Community Fund Drive, and be it

FURTHER RESOLVED: that the Community Fund is hereby authorized to thereafter place said rocketship in the island at Depot Plaza for the duration of the drive, October 21 through October 29, subject to the approval of the Village Manager and without flood lights."

(Ex. 95).

88. On March 10, 1964, the Board granted permission to the Wellesley Club to use Chase Park for three days in May 1964. (Ex. 96).

89. In 1966, the Greater Scarsdale United Fund requested permission to display a 4' x 8' sign in the Depot Plaza area, a sign in Boniface Circle and authorization to move the sign in Boniface Circle to the Village-owned property on the East side of Post Road to Mamaroneck Road from September 10 to October 31, 1966. On July 26, 1966, the Village Manager stated "no problem of one in Boniface Circle but that there would be considerable objection to one at Post and Mamaroneck Roads." The Board passed the following resolution:

"RESOLVED: that the Greater Scarsdale United Fund is hereby authorized to place a sign in the island at Depot Plaza as described in the communication dated July 19th, and be it

FURTHER RESOLVED: that the request for permission to place a similar sign in Boniface Circle and

authorization to remove such sign to the Village-owned property to the East side of Post Road at Mamaroneck Road is hereby referred to the Village Manager for report at a future meeting."

Thereafter, the Village Manager informed the United Fund that Depot Plaza had been approved and that other locations in the residential area of the Village had not been approved. The Village Manager suggested that he and the Fund get together to try and find one or two other locations in the business section of the Village. (Ex. 97).

90. On June 22, 1971, the Board granted permission to the sewing group of the Scarsdale Neighbors, a group of senior citizens, to use the Teen Center on Wayside Lane two mornings each month during the 1971-1972 school year, for the purpose of sewing for the Grasslands Hospital. (Ex. 98).

91. On October 9, 1973, the Senior Class of Scarsdale High School applied for permission to use Chase Park for a carnival for one day in October 1973, for the purpose of calling public attention to and raising funds for the A.F.S.'s sponsorship of foreign exchange students. The Board granted the application. (Ex. 99).

92. In 1974, a student from the Scarsdale High School requested the use of Boniface Circle for a craft sale to raise money for the High School literary magazine. "The Village Manager stated that Boniface Circle is a War Memorial and is mainly used for memorial occasions and services. He recommended the use of the Chase Road lot as an alternative location. The Mayor stated that the request would be denied and the alternate location of Chase Road offered." (Ex. 100).

93. In 1974 and 1976, the Board granted the applications of the Senior Class for permission to use the Scarsdale Municipal Swimming Pool complex for the Senior Class Graduation Breakfasts. (Ex. 101).

94. On July 23, 1974, the Board granted permission to the Street Theater, Inc. to use Chase Park during one day in August 1974, for the purpose of staging a play. (Ex. 102).

95. On October 22, 1974, the Uniformed Fire Fighters Association's "Burn Center Committee" applied for permission to use Chase Park for a baked goods and crafts sale for one day in November 1974, for the purpose of raising funds to build a burn center. The Board granted this application. (Ex. 103).

96. On April 22, 1975, the Board granted the application of the Scarsdale Clergy Association for permission to use Village streets for a walk for the hungry during one day in June 1975. (Ex. 104).

97. On April 26, 1977, the Board granted permission to the United Jewish Appeal-Federation of Jewish Philanthropies to use Village streets for a walk-a-thon during one day in May 1977. (Ex. 105).

98. On January 22, 1980, the Board granted permission to Paul Feiner to use the Village facilities at Village Hall for meetings to be held by the Ad Hoc Committee for a Choice and a Voice in Government. (Ex. 106).

99. In each of the years 1977 and 1980 to 1982, the Scarsdale Chamber of Commerce applied for permission to set up umbrellas and tables on the sidewalks in the Heathcote, central business district and Garth Road areas of the Village for the purpose of attracting the public to summer sidewalk sales. The Board granted these applications. (Ex. 107).

100. On June 23, 1981, the Association to Preserve the Hutch applied for permission to set up a table at the Scarsdale Municipal Swimming Pool complex on July 4, 1981, for the purpose of circulating petitions opposing the expansion and development of the Hutchinson River Parkway. The Board granted this application. (Ex. 108).

101. On May 11, 1982, the Scarsdale Interfaith Committee applied for permission to use Chase Park for a silent vigil during two days in June 1982, for the purpose of calling public attention to the Second Special Session on Disarmament at the United Nations and publicizing the Interfaith Committee's commitment to a mutual U.S.-Soviet nuclear arms race freeze. The Board granted the application. (Ex. 109).

102. On August 17, 1982, the Board granted the application of the Child Care Association of Scarsdale for permission to set up an information table at the Scarsdale Municipal Swimming Pool complex for any three days between August 21, 1982 and August 29, 1982. (Ex. 110).

103. For over sixty years, the government of the Village of Scarsdale has operated under a political system known as the Non-Partisan system in which the Citizens Party puts forth candidates for Trustees and Mayor.

104. Under the Non-Partisan system, the Citizens Party slate for Trustees and Mayor generally is not opposed. However, from time to time a group or an individual runs in opposition to the Citizens Party slate after obtaining necessary signatures of endorsement of residents for candidacy. No opposition candidate has ever been elected to office in Scarsdale.

105. In 1981, 1982, and 1983 there were contested elections. The candidates in each of these years and the election results are shown in the election reports attached as Ex. 111.

106. In the March 1982 election, Anita Resnick ran for Trustee as an Open Government Coalition candidate. In a campaign profile published in the Scarsdale Inquirer on February 18, 1982 (Ex. 112) Ms. Resnick stated that "she would have voted, as the majority of the Board did, not to permit [the creche] on public property".

Also in 1982, William Doescher ran for trustee as a Non-Partisan Open Government Coalition candidate. In his campaign profile in the Scarsdale Inquirer on February 25, 1983 (Ex. 113), Mr. Doescher stated that he would vote against having a creche on public property.

Matthew Callaghan, a candidate in 1982 from the Non-Partisan Open Government Coalition stated in his campaign profile in the Scarsdale Inquirer on March 4, 1982 (Ex. 114) that he was in favor of a creche on Boniface Circle.

The March 16, 1982 election results to select three Trustees were as follows:

For Trustee	Vote
Edward Falkenberg	2,304
William Glendon	2,326
Beatrice Underweiser	2,348
Matthew Callaghan	818
William Doescher	750
Anita Resnick	849

Edward Falkenberg served as trustee during 1981 and voted against the Creche display application in that year. William Glendon was a new candidate for trustee and his position on the Creche issue was not publicly known. Beatrice Underweiser served as trustee in 1980 and 1981 and voted against the Creche display application in each year.

In March, 1982 there were 10,085 registered voters in the Village of Scarsdale.

107. In the March, 1983 election Warren J. Grossman ran independently for office as trustee against three Citizens Party candidates. Mr. Grossman previously ran for office as trustee with two other persons in 1981 under a slate designated as the "Open Government Coalition".

108. In March, 1983, shortly before election day, Mr. Grossman appeared in a "Report Dispatch"[3] sponsored forum at the Scarsdale Public Library. His three Citizens Party opponents did not appear at this forum. Mr. Grossman spoke out on several issues which he believed should be addressed by the Village as described in Ex. 115. Mr. Grossman told residents in attendance that he believed the Scarsdale Creche Committee should be allowed to display its Nativity Scene in Boniface Circle during the Christmas season.

109. In the election of March 15, 1983, the Citizens Party candidates achieved what was described as a "landslide" victory in the March 17 edition of the Scarsdale Inquirer attached hereto as Ex. 116.

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3 The Daily Gannett Westchester County newspaper.

The March 15, 1983 election results to select a Mayor and three Trustees were as follows:

For Mayor	Vote
Seymour Sims (unopposed)	2,236
For Trustee	
Martin Bowen	2,041
Edward Hand	2,159
Evelyn Seidman	2,119
Warren Grossman	656

Seymour Sims served as Trustee from 1978 through 1980 and voted against the Creche display applications in each year. Martin Bowen served as Trustee in 1981 and 1982 and voted for Creche display applications in each year. Edward Hand and Evelyn Seidman were new candidates for Trustee and their position on the Creche issue was not publicly known.

In March, 1983, there were 10,085 registered voters in the Village of Scarsdale.

Dated: New York, New York
July 13, 1983

SIFF & NEWMAN, P.C.

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JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHLEEN S. MCCREARY, ET AL
Plaintiffs

-against-

JEAN STONE, ET AL
Defendants

THE SCARSDALE CRECHE COMMITTEE, ET AL
Plaintiffs

-against-

THE VILLAGE OF SCARSDALE, ET ANO
Defendants

This consolidated action having been tried before the Honorable Charles E. Stewart, U.S.D.J. without a jury on July 20, 1983, and the record consisting exclusively of stipulations of fact, depositions, answers to interrogatories, and exhibits; and the Court having dismissed the damage claims against the four individually named defendants, and insofar as they were no longer trustees, dismissed all equitable claims against the four individually named defendants, and insofar as they were no longer trustees, dismissed all equitable claims against defendants Stone and Brown; and at the conclusion of the trial the Court having reserved its decision as to the remaining defendants; and the Court thereafter on December 8, 1983, having handed down its Opinion (#55491), which constituted the Court's findings of fact and conclusions of law, granting judgment for the defendants in all respects, it is,

ORDERED, ADJUDGED AND DECREED: That this consolidated action be and it is hereby dismissed.

DATED: NEW YORK, N.Y.
December 15, 1983

/s/ RAYMOND F. BURGHARD
Clerk

[Board Minutes 10/8/57]

The Mayor referred the matter jointly to the Liaison Committee with the School Board and the Finance Committee.

The Liaison Committee was requested to consult with the School Board concerning the safety problems and the Finance Committee to consider the availability of Village funds for such a project.

The following communication was presented:

"Board of Trustees
Village Hall, Scarsdale, N.Y.

Dear Sirs:

For some time, it has been the desire of a number of Scarsdale citizens to have a Nativity Scene at Christmas time, in the center of Scarsdale.

Boniface Circle has been thought of as a suitable place for this expression of the real significance of Christmas time.

Before going ahead with any plans necessary for this project, we would like to make sure that the Board of Trustees will permit the placing of the "Nativity Scene" at Boniface Circle.

Yours very truly,
Dorothy R. Molloy (Signed)
(Mrs. David J. Molloy)"

Oct. 4, 1957.

After discussion, the Board agreed to permit the placing of a Nativity Scene in Boniface Circle as requested by Mrs. Molloy.

The following communication was presented:

RESOLUTION

"WHEREAS a proposal has been made to the Board of Trustees of this village that Gaylor Road be made into a one way street for vehicular traffic in a Southerly direction only, and

[Board Minutes 6/28/60]

construction, and we and our neighbors have all been most impressed with the Tuckahoe Construction Company.
The workmen have all been most courteous, considerate, and careful of residents and property. We have all been amazed at the speed of their progress.

Sincerely yours,

Agnes H. Evans (Signed)
(Mrs. Albert I. Evans, Jr.)"

The Mayor ordered the communication placed on file with thanks.

The following communication was presented:

June 28, 1960

The Village Board
Scarsdale, New York.

Attention: Mayor David B. Mathias

Gentlemen:

The Scarsdale Creche Committee, representing the following churches in the Scarsdale area:

St. James the Less
Scarsdale Baptist
Congregational
Our Lady of Fatima
I. H. M.
Grace Lutheran
Trinity Lutheran
Pope Pius X
Greenville Community
Hitchcock Presbyterian

respectfully request permission to erect its nativity scene at Boniface Circle in the village during the 1960 and 1961 Christmas season.

We are making this request early so that we may make the necessary preparations well in advance of the usually busy winter and Christmas season.

This committee received many communications last year from citizens of our village expressing their appreciation of the creche and expressing their hope that we would present it again this coming year.

It is with appreciation of permission granted in the past years that we again ask the Board to pass favorably on this request.

Respectfully yours,
SCARSDALE CRECHE COMMITTEE

By Dorothy a. Kinsella (Signed)
Co-chairman

Mrs. H. B. Kinsella
61 Edgemont Road
Scarsdale, N.Y.''

Dear Mrs. Slaner

The Mayor referred the matter to the Board as a Committee of the whole.

The following communication was presented:

June 17, 1960

''Mrs. Alfred P. Slaner
10 Normandy Lane
Scarsdale, New York

Dear Mrs. Slaner:

At the annual meeting of the Recreation Council on June 8, 1960, the Council's Planning Committee submitted a report on various aspects of its work throughout the year.

It was moved, seconded and passed that the report be accepted and that copies thereof be submitted to the Village Board. Accordingly, I am enclosinig 7 copies of this report herewith and I would appreciate your making distribution to your colleagues on the Board.

I am also enclosing as a matter of interest, 2 copies of the report submitted at this same meeting by our Program Scope

Committee on sports participation at the ScarsdaleHigh School.

Cordially yours,

SCARSDALE RECREATION COUNCIL

Hardy (signed)
G. Hardy Ropes
Chairman''

''REPORT ATTACHED''

The Mayor referred the matter to the Board as a Committee of the Whole. Village attorney that the title to the property is in the name of ''Edward Garfield and Barbara M. Garfield, his wife''.

There are no liens or encumbrances against the property.

Yours very truly

Edward Garfield (Signed)''

The Board considered the petition from the owners and tenants on Popham Road objecting to the elimination of parking spaces in front of their establishments, and after discussion took no action on the petition.

The Board considered the request of the Scarsdale Creche Committee for the use of Boniface Circle during the Christmas season, and postponed action for further consideration.

The Village Attorney presented the following report:

June 27, 1960

MEMO TO: MAYOR & MEMBERS OF THE BOARD OF TRUSTEES

FROM: RICHARD A. TILDEN
Village Attorney

Re: Acquisition of N.Y. Central property

At the Board's request I have been negotiating with New York Central for the acquisition of the parcels of land identified as Parcels Nos. 1, 2, 3 and 4 on the attached map. These parcels contain approximately 175,000 square feet and are presently assessed for approximately $200,000.

The original asking price of New York Central was $250,000. However, after a number of conferences at which former Mayor Ralph Keating played an important part, New York Central has offered to enter into an agreement with the Village under which it will stipulate to accept as an award in condemnation proceedings under which the Village would acquire title to the four parcels, the following:

1. A cash payment of $50,000.

[Board Minutes 9/13/60]

Mrs. Benjamin Kwitman, 7 Canterbury Road, presented and read the following communication:

AMERICAN JEWISH CONGRESS
11 William Street
White Plains, N.Y.

Sept. 13, 1960

" Scarsdale Village Board
Scarsdale, New York

Gentlemen:

It has been brought to the attention of the Scarsdale section of the American Jewish Congress that a request has been made of the Village Board for display of a religious scene in Boniface Circle at Christmas time. Although we have precedents for appealing to the Board on Constitutional grounds in defense of our position—that there be no religious display on public property—we prefer to appeal to the understanding of our neighbors. We, as members of the Jewish faith, find religious display natural and acceptable on Church property, but are distressed by them when they appear in a public place which is shared by all the residents of our community. As a further consideration for the Board in arriving at its decision, may we suggest that more people than ever before are concerned by the injection of religious matters in public affairs. The involvement of the whole nation during this election period in ques-

tions of Church and State and the separation of the two in the interest of all our citizens, of whatever religious pursuasion, makes this particularly important at this time.
We, therefore, respectfully urge that the Village Board safeguard the neighborly feeling in our community by arriving at a decision which will strengthen the American principle of separation of Church and State and the traditional spirit of harmony in our community.

Sincerely,

Ann Kwitman (Signed)
Mrs. Benj. Kwitman
Pres. of the Scarsdale Chapter"

The Acting Mayor referred the request to the Board as a Committee of the Whole.

Mr. Sandor Mark, President, West Quaker Ridge Association, requested the Board to restudy the lack of safety on Weaver Street, at the intersection of Hutchinson River Parkway, for school children crossing the intersection. He stated that the Association

* * * * * *

The Village Manager reported that in awarding the bid for a truck for the Waste Department on May 10, 1960, the low bidder, Edman Dodge, Inc., expected to have a turn-in truck, first, because the advertisement calling for bids so stated and, secondly while this was changed in the specifications when issued, the prospective bidder was shown, through a misunderstanding at the Waste Department, a truck to be taken in trade. He made his bid accordingly. He further reported that when the low bidder learned that he was to receive no turn-in on this item, he requested the Village to adjust his bid price by $190.00, the amount he would lose, allowing for no profit, if he did not receive a truck in trade. The Village Manager stated that after examination of the bidders' working sheets, he recommended authorizing an additional payment of $190.00 to Edman Dodge, Inc., and further stated that after such increase the latter would still be the low bidder.

After discussion, and upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that the proper Village officers are hereby authorized to pay Edman Dodge, Inc., 155 Grove Street, the sum of $190.00 in connection with the purchase of a 9,000 dump truck for the Waste Department at a bid price of $2,616, and the said additional amount to be charged to Waste Department—Account No. 125-300.

The Board considered the request of the Scarsdale Creche Committee.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas season of 1960.

Trustee Alden Smith presented the following ordinance and move its adoption, which motion was duly seconded by Trustee Slaner and said ordinance was adopted by the vote indicated:

"The Board of Trustees of the Village of Scarsdale Westchester County, New York, hereby ordains enacts and publishes as follow:

Section 1. Section 12-7-1 of the Scarsdale Village Code, adopted February 26, 1957, as amended, is hereby further amended to add at the end thereof a new subdivision numbered 16, reading as follows:

"16. Commercial art display studio."

Section 2. This ordinance shall take effect immediately.

Ayes:	Nays:	Absent:
Acting Mayor P. Smith	None	Mayor Mathias
Trustee Hunger		
Trustee Hofheimer		
Trustee Slaner		
Trustee A. Smith		
Trustee Rogers		

Trustee Alden Smith moved the adoption of the following resolution, which was duly seconded by Trustee Luella Slaner, and adopted by the vote indicated:

RESOLVED: that a copy of such ordinance be filed in the office of the Village Clerk and that the Village Clerk is hereby authorized and directed to enter the foregoing ordinance in the minutes and publish a notice setting forth the title and a brief description of the contents of said ordinance and a statement that a copy thereof is on record with the Village Clerk, in the "Scarsdale Inquirer" as required by local law.

Ayes:	Nays:	Absent:
Acting Mayor P. Smith	None	Mayor Mathias
Trustee Hunger		
Trustee Hofheimer		
Trustee Slaner		
Trustee A. Smith		
Trustee Rogers		

[Board Minutes 9/26/61]

has investigated the request of William Dahl for a bus franchise and recommends that the Board look with favor upon the application and call a public hearing in due course. The report was accepted by the Board.

Upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that the section of the Village Board at its meeting on September 12, 1961, authorizing the Mayor to sign a contract with Anthony Perrotta & Sons, 53 Belmont Avenue, New Rochelle, for the construction of an easement sewer on Fairview Road is hereby rescinded because it has been determined that this work can be performed by Village forces.

The Village Clerk presented the report of the Scarsdale Fourth of July Celebration Committee, which was received and placed on file.

The Board considered the request from the Scarsdale Creche Committee for permission to place a creche in Boniface Circle during the 1961 Christmas season, which request has been under study by the Board as a Committee of the Whole.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted.

RESOLVED: that for the year 1961 permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas season, and be it

FURTHER RESOLVED: that the Mayor appoint a Special Committee of the Board Consisting of three trustees (one being designated by the Mayor, as Chairman) to study and report to the Board of Trustees prior to June 30, 1962, on the issue of granting permission to erect a creche on Boniface Circle in subsequent years; that such Special Committee be authorized and empowered but not directed 1) to appoint a Citizens' Committee to advise and assist in the preparation of such report, and 2) to solicit the different views of those in the Village who desired to make their views known.

The Chairman of the Finance Committee recommended certain changes in salaries and outlined to the Board his reasons therefor.

Upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that effective September 1, 1961,the following salaries shall be in effect:
Village manager $18,500 per annum Allocated $12,500 to General Fund Account 31-100 and $6,000 to Water Fund Account, other General Salaries.
Meeting Adjourned

11:45 p.m.

Ethel M. Hyde, Village Clerk

[Board Minutes 10/10/61]

The Acting Mayor referred the matter to the Board as a Committee of the Whole.

* * * * * *

The following communication was presented:

October 9, 1961

The Village Board
Scarsdale, New York.

Attention: Mr. Smith

Gentlemen:

On behalf of the Scarsdale Creche Committee we wish to thank the Board for extending to us permission to erect the Nativity Scene in Boniface Circle this coming Christmas Season. Also we thank the Board for all courtesies extended to us and to our request.

We feel that the two resolutions passed in connection with the granting of our permission are fair and responsible, and it is our earnest hope that they will result in an equitable conclusion.

If the Board should desire any service which we might render, we will be most happy to cooperate in any way.

Respectfully yours,

Mrs. H. B. Kinsella (Signed)
Mrs. William B. Oakes (Signed)

Scarsdale Creche Committee

The Acting Mayor stated that the communication will be placed on file.

* * * * * *

The following communication was presented:

SECOR FARMS PROPERTY OWNERS
ASSOCIATION INC.
Scarsdale, New York

October 10, 1961

Mayor Alden Smith
Board of Trustees
Village Board
Scarsdale, New York

Gentlemen:

We wish to acknowledge the recent installations of various traffic control signs in the Secor Farms area of Scarsdale.

* * * * * *

[Board Minutes 6/28/62]

and directed to publish notice of such hearing in the Scarsdale Inquirer and post same as required by law describing the proposed change.

* * * * * *

Trustee Hobbs, Chairman, Recreation Committee, stated that Hartsdale and Edgemont have requested an extension of time to terminate their participation in the Recreation Department Program. She stated that they would like to have the basketball, baseball and softball programs terminated as of June 24th, 1963.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that the termination date for the participation of Greenville and Hartsdale in the Scarsdale baseball, basketball and softball program is hereby extended until June 24, 1963.

* * * * * *

Trustee Hunger reported that the Special Committee on the Christmas Creche has met with the people involved and with interested leaders of the National Council of Christians and Jews. He stated that the next step will be a meeting of all interested groups by private invitation, to explore the matter further. He stated that Doctor Giles, Professor at New York University, will be at the meeting, which is expected to be held in September. He stated that the Committee's report will have to be extended until October.

* * * * * *

Trustee Hobbs stated that the Committee recommends the request by the Friend's of the Scarsdale Parks, for permission to install benches on the Chase Road lots, should be denied.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

[Board Minutes 10/23/62]

Trustee Hunger presented the following communication:

October 22, 1962

The Village Board
Scarsdale, New York

Gentlemen:

Gentlemen:

The Scarsdale Creche Committee, representing the churches of

St. James the Less
Scarsdale Baptist
Scarsdale Congregational
Our Lady of Fatima
I. H. M.
Grace Lutheran
Pope Pius X
Greenville Community
Hitchcock Presbyterian

respectfully request permission to erect its Nativity Scene in Boniface Circle in the Village of Scarsdale during the Christmas Season of 1962 and 1963.

We will appreciate the careful consideration of the Board to this request.

Respectfully yours,

Scarsdale Creche Committee

By DOROTHY B. KINSELLA
Co-Chairman (signed)

CECEIL OAKES (signed)
Co-Chairman

Trustee Hunger, Chairman of a special committee, (Hunger, Hofheimer & Rogers) appointed by the Mayor to report to the Board regarding the use of Boniface Circle for a display of the Nativity Scene, reported that the Committee met with numerous interested groups during the summer which groups included the National Conference of Christians and Jews, American Jewish Congress, American Jewish Committee, the Scarsdale Creche Committee as well as a group meeting with representatives from the above organizations. He stated that the Committee members also discussed the matter with various interested community leaders, both clergy and laymen, and that pro and con legal opinions were considered as well as the memorandum from the Village Attorney, dated September 21, 1961 and August 17, 1962. He reported that it was the conclusion of the Committee that no change be made in the granting of permission for the use of Boniface Circle as requested by the Scarsdale Creche Committee.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that for the year 1962 permisssion is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas Season.

* * * * * *

Trustee Hofheimer reported on the use of the Crossway Fire House by a Girl Scout Group and stated that the Village Manager has reviewed the policy of the Village and discussed the problem.

[Board Minutes 1/15/63]
ONE THOUSAND AND THIRD REGULAR MEETING

Village Hall Annex
Scarsdale
January 15th 1963

A regular meeting of the Board of Trustees of the Village of Scarsdale was held at the Village Hall Annex on Tuesday evening, January 15, 1963, at 8:15 P.M., E.S.T. There were present Mayor Smith, Trustees Hobbs, Hofheimer and Wacht. Also, Village Manager Tooley, Assistant Village Manager Cordy, Village Attorney Tilden, Assistant to the Village Attorney Kelly, Village Treasurer Craw, Assistant to the Village Manager Foley and the Village Clerk. Absent—Trustees Atwood, Hunger and Rogers.

* * * * * *

The following communication was presented and read:

January 8th, 1963

"Village Board of Scarsdale
Post Road Village Hall
Scarsdale, New York

Gentlemen:

The Scarsdale Chapter of the American Jewish Congress, wishes to record again its protest against the display of a creche on Village property.

Since no explanation has been offered by the Village Board of its decision, many members of the Jewish community believe that their feelings in the matter have been disregarded. Because this is an area involving a great deal of emotion, we have suggested to the Village Board Sub-Committee that efforts be made to bring about mutual understanding by means of a program for community education. Such a program was tentatively discussed at our joint meeting with Dr. H. Harry Giles last Spring.

We trust that the Board will take up the question of a conference of community leaders as a first step in a community education program. The American Jewish Congress is ready to cooperate in whatever way may be deemed advisable.

Sincerely yours,

AUSTICE FREUDMANN (signed)
Mrs. Marcel Freudmann,
President''

The Mayor stated that the matter was fully explored by the committee appointed by the Board to handle the problem and a report was presented to the Board, after which a decision was unanimously taken. He stated that the Board will give the letter and request further consideration.

* * * * * *

The following communication was presented and read:

6 Oakstwain Road
Scarsdale, New York

January 14, 1963

''Hon. Alden C. Smith
Mayor, Village of Scarsdale
City Hall
Scarsdale, New York

Dear Mayor Smith:

The former Holmes property, on the corner of Oakstwain and Fenimore Roads, was subdivided and the house sold in the Fall of 1962. What is a beautiful lawn to this dignified old house is divided into two lots for sale at $21,500, valued together. A short time ago I was informed by Mr. Arja Adair, President of the Greenacres Association, and Mr. Edward S. Hand, President of the Friends of the Scarsdale Parks, that the Village is interested in preserving as much open space as possible. From an aesthetic standpoint this is certainly preferable to the sort of mutilation of an attractive plot of ground such as occurred at 15 Fenimore Road by the crowding together of houses. If two houses are built on the Holmes lots,

they would not only be crowded together, but several beautiful old trees would have to be sacrificed. Mr. Adair and Mr. Hand suggested that it might be worthwhile to explore the interest of the Village in acquiring the two lots still belonging to Mrs. Eleanor Holmes as an open park area. They felt that this might be possible on the basis of some modification of the plan by which the Scarsdale Lumber Company was acquired.

Acting on this suggestion, I called a meeting of the neighbors immediately adjacent to the Holmes property. A nuclear group of seven property owners would be willing to contribute approximately $9000 toward the acquisition of this property for the Village. It is our understanding that such contributions might be made over a period of twenty years, in yearly installments which would become a special tax lien against the property of those contributing. We also learned that there are probably other people who would be willing to make a single contribution toward such a project, so that any plan for the acquisition of the property should make it feasible to use either form of contribution. I have mentioned a nuclear group of seven. These are the people immediately contiguous to the Holmes lots. Other property owners, about five, on the block between Brewster Road and Brite Street, were unavailable at the time, and have not been approached, but might contribute. Two nearby houses have just been sold and it has not been possible to discuss the matter with the new owners as yet. Two other

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[Board Minutes 1/29/63]

that most of the accidents involved two cars. He stated that except for the month of December the accidents are usually occurring in clear, dry, weather under good driving conditions. He further stated that non-residents caused 100 more accidents than residents. He stated that all measures have been taken to decrease accidents and it would appear that there is

nothing further to be done by the Police Department.

* * * * * *

Trustee Hunger reported that the Public Safety Committee recommends a survey of the Fire and Police Departments and has contacted several agencies to make such a survey. He reported that it would seem to the committee that the survey be limited to three areas, the first to report on and make recommendations of the Police and Fire Departments. Second, to have the Village Manager's Office find someone to work specifically on the study and three, to have an expert hired on a weekly or monthly basis to advise in the areas for improvement and perhaps combination of the two departments.

After discussion, the Board agreed to discuss the matter further at the next meeting.

* * * * * *

Trustee Hunger reported that since receipt of the letter from the American Jewish Congress on the matter of the Creche in Boniface Circle, he had received a letter from the Chairman of the American Jewish Congress and from the Chairman of the American Jewish Committee, both requesting a meeting for clarification of various points including the matter of separation of church and state. He suggested that Dr. Giles be requested to conduct such a meeting between the representatives of these two organizations and the committee of the Board.

After discussion, it was the concensus of opinion that if the committee wishes to reconstitute itself and invite Dr. Giles to conduct a meeting on the Creche matter, the Board has no objection.

* * * * * *

Trustee Atwood reported in the matter of the possible acquisition of the Brissendon property adjacent to Hyatt Field, that the committee recommends the Village Attorney be authorized to contact Mr. Brissendon about a possible relocation of the right-of-way to his property.

After discussion, the Village Attorney was so authorized.

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Trustee Hobbs reported that the Edgemont section of Greenburgh would like reconsideration of Scarsdale's proposal to eliminate them from the Recreation Department's Program and stated that her committee will meet with representatives from Edgemont.

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Trustee Hobbs reported that in regard to the communication of the Westchester County Association asking the Board to write to the State Legislation supporting the establishing of a four-year college in Westchester, she has learned that if we do not wish to support it, they are not interested in our views. She stated that she had discussed the matter with John Gardiner, President of the Carnegie Foundation and he seems to feel that as long as a four-year college is to be built, it might as well be built in Westchester and it should be supported. She stated she had also consulted with Supervisor Berle, who would prefer to see the same amount of money put into the extension of the present two-year college.

After discussion, the Board took no action in the matter.

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Trustee Hobbs reported that Miss Helen Hult, a fourth grade teacher in the Edgewood Grammar School, collaborating with Mrs. Brooking

[Board Minutes 2/12/63]
TREASURER'S PAYROLL AND PETTY CASH ACCOUNT
JANUARY, 1963

Hway Payroll Wk.End. 1/2/63	$ 4,477.49
State of New York	5.00
John J. Doyle	13.55
Waste Payroll-Wk.End. 1/4/63	5,382.12
Postmaster, Scarsdale, N.Y.	27.00
Postmaster, Scarsdale, N.Y.	10.00
Hway. Payroll - Wk.End. 1/9/63	3,616.26
Waste Payroll - Wk.End. 1/11/63	4,977.32
Payroll Period 1/1 - 1/15/63	32,913.23
Sch.Cr.Gds. Payroll Per 1/1-1/15/63	1,959.57
Sch.Cr.Gds. Payroll P/T 1/1-1/15/63	665.00
Postmaster, Scarsdale, N. Y.	45.00
Library Payroll-Period 1/1-1/15/63	3,120.21
Hway. Payroll Wk.End. 1/16/63	3,784.06
Waste Payroll-Wk.End. 1/18/63	4,699.80
Municipal Finance Offices Assn.	1.70
Hway.Payroll-Wk.End. 1/23/63	4, 123.02
Waste Payroll-Wk.End. 1/25/63	4,703.12
Postmaster, Scarsdale, N.Y.	500.00

Payroll Period 1/16-1/31/63	37,284.78
Sch.Cr.Gds. Payroll Per. 1/16-1/31/63	2,180.89
Sch.Cr.Gds. Payroll P/T- 1/16-1/31/63	665.00
Library Payroll-Period 1/16-1/31/63	3,246.92
John J. Doyle	22.80
Scarsdale Diner	22.50
Assoc. Hosp. Serv. of N.Y.	2,672.36
Cash for Petty Cash - January	51.47
Assoc. Hosp. Serv. of N.Y. - Library	58.12
	$121,228.29

WATER DEPARTMENT

Payroll-Wk.End. 1/4/63	$ 964.96
Postmaster, Scarsdale, N.Y. - 1¢ stamps	68.50
Payroll-Wk.End. 1/11/63	961.40
Payroll Period 1/1-1/15/63	1,667.77
Payroll-Wk.End. 1/18/63	1,105.63
Payroll-Wk.End. 1/25/63	1,108.60
Payroll Period 1/16-1/31/63	2,042.76
Assoc. Hosp. Serv. of N.Y.-Water	189.80
Postmaster, Scarsdale, N.Y. - 2/1 Bills	176.40
	$ 8,285.82

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The Board then went into executive session, and upon arising and resuming the public session, Trustee Hunger stated that the Creche Committee has considered the request of the American Jewish Congress that the Village organize and help sponsor a meeting. He stated that it is the committee's recommendation that the Creche Committee be authorized to proceed to organize a meeting that will be free of the press, limited to twenty people and presided over by Dr. Giles.

After discussion, the Board agreed to the recommendation.

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Trustee Hunger read letters of commendation to the Police Department from the following: Mercedes and Dick Reeves; Mrs. Grace McIvers, School Nurse, Junior High School; Dr. Hans Abeles, 175 East 79th St., New York City; Dr. Alvab M. Weiss, 10 Nosband Ave., White Plains, New York; Mr. and Mrs. Donald Yarkin, 33 Vernon Road; Deputy Chief Louis Satriale of the Mount Vernon Volunteer Fire Department; Adele Brody, 119 Walworth Ave and Elinor G. Smith, 17 School Lane.

Trustee Hunger reported that the increased accident rate is due to bad weather and the increase in traffic passing through the Village.

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Trustee Hunger presented and read the following communication:

February 9, 1963

Scarsdale Police
Benevolent Assoc.

"Mayor Alden C. Smith
11 Carstensen Road
Scarsdale, New York

Att: SCARSDALE VILLAGE BOARD

Dear Mayor,

On January 21, 1963, the Scarsdale Police Benevolent Association held their meeting at Police Headquarters and voted that the following requests be considered by the Village Board to be adopted into the 1963-'64 budget.

1) Eight (8) percent increase in pay for all grades.
2) Twenty Five year retirement for the Police Department.

It is the feeling of this organization that these requests are justified as it will place your Police Deparment on a par with the police of area municipalities.

[Board Minutes 4/9/63]

The Village Clerk presented the 1961 study of market values in Scarsdale by the State Board of Equalization and Assessment and reported that the State Board will meet with Town and Village officials on Wednesday, April 17th at 10:00 A.M. to discuss the survey.

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The Village Clerk presented a notice from the Westchester County Tax Commission that it will hold a hearing at the Village Hall on the 3rd day of May, 1963 at 1:30 P.M. on the standards employed for the assessment of real properties in Scarsdale. She stated that this meeting is held each year and any member of the Board who wishes may attend the meeting.

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The Village Clerk reported that the certificate of final railroad ceiling for the assessment roll filed in 1963 has been received and the ceiling fixed at $219,722. for the New York Central Railroad.

* * * * * *

The Board then went into executive session, and upon arising and resuming the public session, Trustee Hofheimer reported that as authorized by the Board, the reconstituted

Creche Committee requested Dr. Giles, a Professor at N.Y.U. in the field of human relations, to conduct an informal meeting for the clarification of various points of disagreement on the location of a Christmas Creche in Boniface Circle. He stated that, at the request of Dr. Giles representatives of the most divergent views were invited, almost all attended or sent a substitute and the meeting was held on March 28th at the firehouse. He stated that Dr. Giles has the ability to get people to express what they feel without hurting feelings and there was a very free exchange of opinion. He further reported that although the meeting did not result in any conclusions and was not expected to, it brought a better understanding of opposing views. He further reported that although no further meetings were scheduled, they may be held under the auspices of the National Council of Christians and Jews but, as far as the Board is concerned, the Committee feels its obligation has been fulfilled to keep things on a non-emotional basis.

* * * * * *

Trustee Allen reported that the Public Property Committee has studied the matter of repairs to the station building and presented the following resolution which upon motion duly made and seconded was unanimously adopted:

RESOLVED: that the Village should take care of the following repairs:

1. Leaks in the roof.
2. New screens in the toilet room window frames.
3. Replacement and painting of rotted exterior wood trim.
4. Paint West Wall rain water conductor.

and be it

FURTHER RESOLVED: that the Village should discuss with the Railroad the possibility of the Railroad considering the repairs as outlined in the Town Club report perhaps in conjunction with the subtenant in the North end of the building, including, but not necessarily limited to electric light fixtures, linoleum, plumbing fixtures and improvements to the heating system, and be it

FURTHER RESOLVED: that the Village request the Railroad to improve its cleaning procedures in general and toilet room in particular, perhaps by means of a commercial cleaning service.

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[Board Minutes 11/12/63]

The Clerk presented and read the following communication:

November 22, 1963

"The Village Board
Scarsdale, New York.

Attention: Mayor Ralph K. Rogers

Gentlemen:

The Scarsdale Creche Committee, representing the churches of

St. James the Less
Scarsdale Baptist
Scarsdale Congregational
Our Lady of Fatima
I.H.M.
Pope Pius X
Grace Lutheran
Trinity Lutheran
Greenville Community
Hitchcock Presbyterian

respectfully request the permission to erect its Nativity Scene in Boniface Circle in the Village of Scarsdale during the Christmas Season of 1963 and 1964.

It is the prayerful hope that this permission will be again forthcoming, not only by the Creche Committee but by many citizens of Scarsdale to whom the Creche has become increasingly important and increasingly valued as part of Christmas observance in Scarsdale.

Respectfully yours,

BY DOROTHY B. KINSELLA
(signed)
BY CECEILA I. OAKES
(signed)
Co-Chairman''

The Mayor referred the matter to the Board as a Committee of the Whole.

* * * * * *

The Village Clerk presented and read a communication from George W. Wilson, 56 Tunstall Road requesting the Board to submit the question of whether the Chase Road lots should be preserved as a park or turned into a parking lot, to the qualified voters of the Village.

The communication was referred to the Master Plan Committee Fund—Drainage Improvements, Account #5890-201, and be it,

FURTHER RESOLVED: that the Planning Commission is hereby requested to review the traffic and drainage problems in connection with said lot and to present to the Board its recommendations with respect to the manner in which the above purposes can be accomplished, including the portion of the lot which can be developed for use for one one-family dwelling.

AYES	NAYS	ABSENT
Trustee Atwood	Trustree Allen	Trustee Hobbs
Trustee Rutherford	Trustee Hofheimer	
Trustee Wacht		
Mayor Rogers		

The Engineering Department was requested to make a report, after consultation with the County, on the matter in which to improve the safety factors and traffic hazards at the corner of Murray Hill Road and Post Road.

* * * * * *

The Board discussed the request of the Scarsdale Creche Committee to place a Creche in Boniface Circle during the Christmas holidays and the matter was referred to the Law Committee for report at the next meeting.

* * * * * *

Trustee Hofheimer reported that the case of Labriola against the Village of Scarsdale in the matter of the construction of Brewster Road has been settled, but all of the formalities have not been completed and he will have a full report at the next meeting.

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The Village Attorney reported that in the matter of the exchange of land with the County of Westchester, certain minor

[Board Minutes 11/26/63]
1963 regarding the control of dutch elm disease. He stated that the Law Committee recommends the suggestions of the Village Attorney be put into effect.

After discussion, if was agreed that the matter would be held over until the next meeting to give an opportunity to all members of the Board to study the memorandum.

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Trustee Hofheimer reported that the Law Committee is still studying the matter of an Architectural Review Board for the

Village of Scarsdale.

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Trustee Hofheimer reported that the Law Committee recommends that the request of the Scarsdale Creche Committee for permission to erect a creche in Boniface Circle be granted.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that for the year 1963 permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas Season.

* * * * * *

The Village Attorney reported that judgment has been entered against the Village of Scarsdale in the case of Labriola Construction Corporation regarding the Brewster Road relocation, in the sum of $76,562.09 without interest and cost provided the amount is paid within 30 days from November 4, 1963.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that the Village Treasurer is hereby authorized to pay the sum of $76,562.09 to Labriola Construction Corporation in payment of the judgment entered on the 4th day of November, 1963 by the Honorable Gerald Nolan, Justice,

[Board Minutes 12/8/64]
to present their views.
The Mayor referred the matter to the Public Property Committee.

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The Village Clerk read a communication from Stuart B. Glover transmitting the interim report fo the Recreation Council to the Board.

The Mayor referred the report to the Recreation Committee.

Trustee Hobbs expressed appreciation to the Recreation Council for the report.

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The Village Clerk presented and read a communication from Seymour L. Mantell, 47 Fenimore Road, requesting the Village to institute a bicycle program through the Police Department which would provide for instruction in safety rules, a road test, bicycle inspection, identification and license, with penalties for violation of safety and non-licensing.

The Mayor referred the matter to the Public Safety Committee.

* * * * * *

The Village Clerk presented and read the following communciation:

November 24, 1964

"The Village Board
Scarsdale, New York

Attention: Mayor Ralph K. Rogers

Gentlemen:

The Scarsdale Creche Committee, representing the churches of

St. James the Less
Scarsdale Baptist
Scarsdale Congregational
Our Lady of Fatima
Immaculate Heart of Mary
Pope Pius X
Trinity Lutheran Church
Grace Lutheran Church
Greenville Community
Hitchcock Presbyterian

respectfully request permission to erect its Nativity Scene in Boniface Circle in the Village of Scarsdale during the Christmas Season of 1964 and 1965.

In the celebration of Christmas with its many varied customs throughout the Village, it is our earnest hope that our Creche will again be included as a part of the general observance.

We will appreciate deeply your granting of this request.

Respectfully yours,

SCARSDALE CRECHE COMMITTEE

BY DOROTHY B. KINSELLA (signed)
Co-Chairman

BY CECEILA I. OAKES (signed)
Co-Chairman

Upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that for the year 1964 permission is hereby granted to the Scarsdale Creche committee to place a Nativity Scene in Boniface Circle during the Christmas Season.

* * * * * *

The Village Clerk presented and read a communication from Mrs. Nan M. Shapiro, Village Board Liaison Representative, Heathcote Parent-Teacher Association, thanking Mr. Tilden and the Village Board for the Prompt and effective solution to the advertisement for guns appearing in the Junior Scholastic Magazine.

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The Village Clerk presented and read a communication from Mrs. Carl S. Rowe, 175 Brewster Road, informing the Board that Gristede's Store on Garth Road near Popham Road was closed because of its poor location in relation to the apartments and

[Board Minutes 11/22/66]

November 17, 1966

The Village Board
Scarsdale, New York

Gentlemen:

The Scarsdale Creche Committee, representing the churches of

St. James the Less
Scarsdale Congregation
Scarsdale Baptist
Our Lady of Fatima
Immaculate Heart of Mary
Pope Pius X
Trinity Lutheran
Grace Lutheran
Greenville Community
Hitchcock Memorial

respectfully request permission to erect its nativity scene in Boniface Circle in the Village of Scarsdale during the approaching Christmas Season.

The Creche Committee is deeply appreciative of permission given to us in previous years. We thank you for this permission, and weagain are hoping that the Board may grant our request.

Respectfully yours,

SCARSDALE CRECHE COMMITTEE

BY_____
Co-Chairman

_____
Co-Chairman

[Board Minutes 11/22/66]
VILLAGE BOARD MEETING

November 22, 1966

A regular meeting of the Board of Trustees of the Village of Scarsdale was held at the Village Hall Annex on Tuesday evening, November 22, 1966, at 8:15 P.M., E.S.T. There were present Mayor MacIntyre, Trustees Delany, Dyson, Horowitz and Stix. Also, Village Attorney Tilden and the Deputy Village Clerk.

Absent — Trustee Allen and the Village Clerk.

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Mayor: Public hearing on a change covering the appointment of police officers, appointments to be be made directly by the Village Manager. Unless the Trustees so desire we will dispense with the reading of the legal notice. Any written communications? Any oral communications?

Delany: I move the adoption of the amendment to Local Law No. 1 of 1949.

Dyson: Second.

Mayor: Any discussion?

Roll call vote — all ayes.

Horowitz: Ratify the actions of the Village Manager on the appointment of offices prior to this time.

Delany: Move that the Board ratify and confirm all officers.

Dyson: Second.

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Mayor: Any written communications?

Deputy Clerk: Communication from the Scarsdale Creche Committee requesting permission to erect creche in Boniface Circle for 1966.

Mayor: Does the Village Attorney hold this use legal?

Tilden: Yes.

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The question was taken upon the foregoing Local Law which was adopted by the following vote:

AYES:	NAYS:	ABSENT:
Mayor MacIntyre	None	Trustee Allen
Trustee Delany		
Trustee Dyson		
Trustee Horowitz		
Trustee Stix		

Trustee Delany moved the adoption of the following resolution, which was seconded by Trustee Dyson:

RESOLVED: that the Village Clerk is hereby authorized and directed to file within five days after adoption, three certified copies thereof in the office of the Secretary of State and one copy in the office of the State Comptroller.

The question was taken on the foregoing resolution, which was adopted by the following vote:

AYES:	NAYS:	ABSENT:
Mayor MacIntyre	None	Trustee Allen
Trustee Delany		
Trustee Dyson		
Trustee Horowitz		
Trustee Stix		

Upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that the Board hereby ratifies and confirms all appointments of police officers of the Village of Scarsdale made by the Village Manager on or after March 8, 1949.

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The Deputy Clerk presented a communication from the Scarsdale Creche Committee requesting permission to erect a creche in Boniface Circle for 1966.

The Mayor held the matter over for discussion in executive session.

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the 1966 Village assessment roll which has been set at 44 and stated this proposed rate is the same as last year.

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The Board then went into executive session at 10:00 P.M., and after arising and resuming the open session and after discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that this Board, in behalf of the Village of Scarsdale, welcomes all good neighbors, regardless of race, creed, color or national origin and urges all citizens to support the principle of open housing.

* * * * * *

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that for the year 1966 permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas Season.

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The Deputy Clerk presented the papers in the matter of discipline proceedings against George Tobin, Police Officer, together with a communication from Patrolman Tobin requesting a Leave of Absence from November 22, 1966 to January 10, 1967 and adjournment of the hearing until January 10th.

November 16, 1973

The Village Board
Scarsdale, New York

Gentlemen:

The Scarsdale Creche Committee, representing the churches of:

St. James the Less
Scarsdale Baptist
Scarsdale Congregational
Our Lady of Fatima
Immaculate Heart of Mary
Church of St. Pius X
Grace Lutheran
Trinity Lutheran
Redeemer Lutheran
Greenville Community
Hitchcock Presbyterian

respectfully request permission to erect its Nativity Scene in Boniface Circle in the Village of Scarsdale during the Christmas Season of this year.

It is with a deep feeling of gratitude that we have been granted this permission for over a decade now, and would deeply appreciate it if you will again grant our request.

Respectfully submitted,

Scarsdale Creche Committee

By_____
Co-Chairman

By_____
Co-Chairman

Upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that for the year 1973 permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas Season.

[Board Minutes 11/27/73]

Clerk: Communications favoring the Board's proposal from the Friends of Scarsdale Parks, S.N.A.P., League of Women Voters and from the following residents:

Deborah West Zipf, 22 Gorham Rd.
The Vallet Family
Carol and Norman Comerance, 49 Lawrence Rd.
Paul D. Spindel

Mayor: The written communications will be noted and made a part of the record. Any oral communications? I declare the hearing closed.

Heming: I believe all the Trustees have in front of them a proposed Local Law #1 and proposed Local #2. I propose that the two laws be enacted.

Roll call vote on Local Law #1 - all ayes
Roll call vote on Local Law #2 - all ayes

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Mayor: We now come to written communications.

Clerk: Communication from the Scarsdale Creche Committee requesting permission to erect a Nativity Scene during the Christmas season this year.

Mrs. Hackett: Move permission be granted.

Szabad: I am going to abstain from voting because I think there should be a clear-cut separation between church and state.

Mayor: Trustee Szabad's comments will be noted in the record.

All ayes - Trustee Szabad abstaining.

Mayor: Will the Clerk please notify the Creche Committee.

* * * * * *

Clerk: Communication from Richard F. Balzac requesting the use of the four paddle tennis courts on Brite Ave. on Saturday, January 19th from 8:30 A.M. to 1 P.M. for the Annual Jambles Tournament.

Johnson: For some time we have worked in cooperation with the Fox Meadow Club. As you know we use the Fox Meadow courts for the tournament during the summer. The Recreation Committee and the Recreation Dept.

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to the point and place of beginning." Said property being designated on the Tax Assessment Map of the Village of Scarsdale as Section 2, Block 4, Lot 1A and Right-of-way.

2. This Local Law shall be effective immediately.

The question was taken upon the foregoing Local Law which was adopted by the following vote:

AYES:	NAYS:	ABSENT:
Mayor Steyer	None	None
Trustee Finney		
Trustee Hackett		
Trustee Heming		
Trustee Hodges		
Trustee Johnson		
Trustee Szabad		

Trustee Heming moved the adoption of the following resolution, which was seconded by Trustee Finney:

RESOLVED: that the Village Clerk is hereby authorized and directed to file within five days after said Local Law takes effect, three certified copies thereof in the office of the Secretary of State and one copy in the office of the State Comptroller.

The question was taken on the foregoing resolution, which was adopted by the following vote:

AYES:	NAYS:	ABSENT:
Mayor Steyer	None	None
Trustee Finney		
Trustee Hackett		
Trustee Heming		
Trustee Hodges		
Trustee Johnson		
Trustee Szabad		

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The Village Clerk presented a communication from the Scarsdale Creche Committee requesting permission to erect a Nativity Scene in Boniface Circle during the Christmas season this year.

Upon motion duly made and seconded, the following resolution was adopted, Trustee Szabad abstaining:

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RESOLVED: that for the year 1973 permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas Season.

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The Village Clerk presented a communication from Richard F. Balzac requesting the use of the four paddle tennis courts on Brite Avenue on Saturday, January 19, 1974 from 8:30 A.M. to 1:00 P.M. for the Annual Jambles Tournament of the Fox Meadow Tennis Club.

Upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED: that the Fox Meadow Tennis Club is hereby authorized to use the four paddle tennis courts on Brite Avenue on Saturday, January 19, 1974 from 8:30 A.M. to 1:00 P.M. for the Club's "Jambles".

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The Village Clerk presented a communication from Stafan Priestley calling attention to the concern of the residents on the volume and speed of traffic using Autenrieth Road and offering suggestions to correct the matter.

The Mayor referred the matter to the Police Commissioner and the Village Manager.

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Trustee Finney stated that the Scarsdale Volunteer Ambulance Corps believes it can be of greater service than it has been called upon to provide and if they were called upon more often they would be able to attract more volunteers. He stated that discussions will be carried on with the Police and Fire Departments but as yet no program has been formulated.

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The Mayor announced again that during the month of December

[Board Minutes 11/26/74]

November 16, 1974

The Village Board
Scarsdale, N.Y.

Gentlemen:

The Scarsdale Creche Committee, representing the following churches:

St. James the Less
Scarsdale Baptist
Scarsdale Congregational
Our Lady of Fatima
Church of St. Pius X
Immaculate Heart of Mary
Grace Lutheran
Trinity Lutheran
Redeemer Lutheran
Greenville Community
Hitchcock Presbyterian

respectfully request permission to erect its Nativity Scene at Boniface Circle in the Village of Scarsdale, during the Christmas Season of this year. We appreciate the permission you have granted to us these past many years and will apprciate again, your permission to us to again erect our Creche.

Respectfully submitted,
Scarsdale Creche Committeee

By__ _____
Co-Chairman

By_____
Co-Chairman

[Board Minutes 11/26/74]
VILLAGE BOARD MEETING

November 26, 1974

A regular meeting of the Board of Trustees of the Village of Scarsdale was held in Rutherford Hall in the Village Hall on Tuesday evening, November 26, 1974, at 8:15 P.M., E.S.T. There were present Mayor Steyer, Trustees Brennan, Heming, Hodges, Johnson and Szabad. Also the Village Clerk, Deputy Village Clerk, Village Attorney, Village Treasurer, Deputy Village Treasurer, Village Manager, Assistant Village Manger and the Assistant to the Village Manager.

Absent - Trustee Kahn.

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Mayor: Some of the residents who attend our meetings have been having difficulty hearing. If any of you are having trouble will you move forward instead of our turning on the address system.

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Dep. Vill. Clerk: Communication from the Scarsdale Creche Committee requesting permission for Nativity Scene in Boniface Circle.

Johnson: Move resolution.

Hodges: Second

Szabad: I am abstaining. I believe it is unconstitutional and not correct separation of Church and State. At the same time I believe there will be more harm done than good by denying the application but I cannot vote for it.

Mayor: The resolution is attached to the request and it will be granted.

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Dep. Vill. Clerk: Communication from the Scarsdale Garden Club Section of the Scarsdale Woman's Club urging the Village to improve its inspection of the valuable and beautiful trees in the Village.

Mayor: The letter will be filed. Trustee Szabad will make a report on the question of the Village's policy on trees.

[Board Minutes 11/26/74]
ONE THOUSAND TWO HUNDRED SIXTIETH REGULAR MEETING

Rutherford Hall
Village Hall
Scarsdale
November 26, 1974

A regular meeting of the Board of Trustees of the Village of Scarsdale was held in Rutherford Hall in the Village Hall on Tuesday evening, November 26, 1974, at 8:15 P.M., E.S.T. There were present Mayor Steyer, Trustees Brennan, Heming, Hodges, Johnson and Szabad. Also the Village Clerk, Deputy Village Clerk, Village Attorney, Village Treasurer, Deputy Village Treasurer, Village Manager, Assitant Village Manager and the Assitant to the Village Manager.

Absent - Trustee Kahn.

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The Deputy Village Clerk presented a communication from the Scarsdale Creche Committee requesting permission to erect a Nativity Scene in Boniface Circle during the Christmas Season.

Upon motion duly made and seconded, the following resolution was adopted, Trustee Szabad abstaining:

RESOLVED: that for the year 1974 permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas Season.

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The Deputy Village Clerk presented a communicatioin from the Scarsdale Garden Club Section of the Scarsdale Woman's Club urging the Village to improve its inspection of valuable and beautiful trees in the Village.

The Mayor stated that Trustee Szabad will make a report on the Village's tree policy and ordered the communication noted and filed.

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[Board Minutes 11/26/74]
VILLAGE BOARD MEETING

November 26, 1974

A regular meeting of the Board of Trustees of the Village of Scarsdale was held in Rutherford Hall in the Village Hall on Tuesday evening, November 26, 1974, at 8:15 P.M., E.S.T. There were present Mayor Steyer, Trustees Brennan, Heming, Hodges, Johnson and Szabad. Also the Village Clerk, Deputy Village Clerk, Village Attorney, Village Treasurer, Deputy Village Treasurer, Village Manager, Assitant Village Manager and the Assitant to the Village Manager.

Absent - Trustee Kahn.

* * * * * *

Mayor: Some of the residents who attend our meetings have been having difficulty hearing. If any of you are having trouble will you move forward intead of our turning on the address system.

* * * * * *

Dep. Vill. Clerk: Communication from the Scarsdale Creche Committee requesting permission for Nativity Scene in Boniface Circle.

Johnson: Move resolution.

Hodges: Second

Szabad: I am abstaining. I believe it is unconstitutional and not correct separation of Church and State. At the same time I believe there will be more harm done than good by denying the application but I cannot vote for it.

Mayor: The resolution is attached to the request and it will be granted.

* * * * * *

Dep. Vill. Clerk: Communication from the Scarsdale Garden Club Section of the Scarsdale Woman's Club urging the Village to improve its inspection of the valuable and beautiful trees in the Village.

Mayor: The letter will be filed. Trustee Szabad will make a report on the question of the Village's policy on trees.

[Board Minutes 11/18/75]
SCARSDALE CRECHE COMMITTEE
SCARSDALE, N.Y.

November 7, 1975

The Village Board
Scarsdale, New York

Gentlemen:

The Scarsdale Creche Committee, representing the following churches:

St. James the Less
Scarsdale Baptist
Scarsdale Congregational
Our Lady of Fatima
Church of St. Pius X
Immaculate Heart of Mary
Grace Lutheran
Trinity Lutheran
Redeemer Lutheran
Greenville Community
Hitchcock Presbyterian

respectfully request permission to erect its Nativity Scene in Boniface Circle in the Village of Scarsdale, during the coming Christmas Season.
We appreciate the permission you have granted to us these past many years and will appreciate again, your permission to us to again erect our creche.

Respectfully submitted,

Scarsdale Creche Committee

By_____
Co-Chairman

By_____
Co-Chairman

[Board Minutes 11/18/75]
SPECIAL MEETING

Rutherford Hall
Village Hall
Scarsdale
November 18, 1975

A special meeting of the Board of Trustees of the Village of Scarsdale was held at Rutherford in the Village Hall on Tuesday evening, November 18, 1975, at 8:15 P.M., E.S.T. There were present Mayor Johnson, Trustees Brennan, Heming, Jensen, Kahn, Richman and Szabad. Also the Village clerk, Deputy Village Clerk, Village Attorney, Village Treasurer, Village Manager and the Assistant Village Managers.

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The Deputy Village Clerk presented a communication from the Scarsdale Creche Committee requesting permission to erect a Nativity Scene in Boniface Circle during the Christmas Season.

Upon motion duly made and seconded, the following resolution was adopted, Trustee Richman voting Nay and Trustee Szabad abstaining:

RESOLVED: that for the year 1975, permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas Season.

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The Deputy Village Clerk presented a communication from Stuart P. Schirota inviting the Mayor and the Board of Trustees to the Annual Christmas Sing on Sunday, December 21st, at the Village Hall and requesting some Christmas decorations this year.

The Mayor stated that the public is invited and each Trustee will notify Mr. Schirota of his intention.

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The Deputy Village Clerk presented four communications and one telephone call in opposition to the sale of Village-owned

[Board Minutes 12/9/75]

AYES	NAYS	ABSENT
Mayor Johnson	None	None
Trustee Brennan		
Trustee Heming		
Trustee Jensen		
Trustee Kahn		
Trustee Richman		
Trustee Szabad		

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The Mayor stated that the Village employess held a retirement party last week for Bill Meyer and Joe Cantatore. 125 people were present. Bill has been Clerk of the Works on just about every project in the Village for the past 10 years and the quality of the construction has been his contribution to the Village. Joe has been General Foreman of the Highway Department and has served the Village for 25 years.

The Mayor presented Mr. Meyer and Mr. Cantatore with plaques in appreciation for their services to the Village.

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The Deputy Village Clerk presented a communication from Mrs. Nettie Breines, 8 Ho.seguard Lane, protesting the Nativity Scene at Boniface Circle and questioning the legality of placing it on Village-owned land.

The Mayor stated that the Village Attorney has looked into the question of the legality of allowing the Creche Committee to place a Nativity Scene at Boniface Circle. It appears that the case law in Westchester County has supported the allowance of this type of thing on public property.

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The Deputy Village Clerk presented a communication from Mrs. Joan Scobey, 9 Lenox Place, favoring Impact Equivalency Zoning.

The Deputy Village Clerk presented communications opposing Impact Equivalency Zoning from the following:

[Board Minutes 11/23/76]
SCARSDALE CRECHE COMMITTEE
SCARSDALE, N.Y.

November 10, 1976

To the Village Board
Scarsdale, N.Y.

The Scarsdale Creche Committee, representing the following churches:

St. James the Less
Our Lady of Fatima
Church of St. Pius X
Immaculate Heart of Mary
Grace Lutheran
Trinity Lutheran
Church of the Redeemer Lutheran

respectfully request permission to erect its Nativity Scene at Boniface Circle in the Village of Scarsdale, during the coming Christmas Season. We appreciate the permission you have granted to us these past many years, and will appreciate again, your permission to us to again erect our creche.

Respectfully submitted,

Scarsdale Creche Committee

By:_____

1 Rochambeau Road
Scarsdale, NY

By:_____
307 Boulevard
Scarsdale, NY

The Scarsdale Creche Committee
Scarsdale, New York

November 26, 1976

The Village Board
Scarsdale, New York

Mayor Johnson and Trustees:

The Scarsdale Creche Committee would like to express their appreciation for your favorable vote in granting us permission to erect our creche once again at Boniface Circle. We will be happy to follow the guidelines agreed on at Tuesday's meeting and ask that you send us the exact wording for the sign which we will place along side the creche.

Thank you again and be assured that you will receive our utmost cooperation.

Respectfully yours,

The Scarsdale Creche Committee

1 Rochambeau Road
Scarsdale, New York

The Deputy Village Clerk presented a communication from the Scarsdale Creche Committee requesting permission to erect a creche in Boniface Circle during the Christmas season.

The Mayor stated that a number of communications have been received on this matter, one of which was signed by ten clergymen in the Village suggesting that it might be more appropriate to have the creche rotated among church properties in the Village. At the request of the Board, the Advisory Committee on Human Relations has submitted a communication recommending that the request of the Scarsdale Creche Committee be granted.

Trustee Gordon stated that the Law Committee, together with the Village Attorney, had been requested to research the law in this matter. The decisions found do not prohibit the erection of a creche on public property provided it is not

erected by the government agency. If the government agency does not put it up it does not violate the First Amendment or the Constitution of the State of New York. In the District of Columbia when they considered the matter the Judge thought it would be useful if there was some sign to indicate that the creche was erected by a private group and not a public authority. This would be a useful addition to the resolution granting permission to the Scarsdale Creche Committee.

The following persons appeared in favor of granting permission to the Scarsdale Creche Committee to erect a creche in Boniface Circle:

Mrs. William Green, representing the church of St. James the Less
Thomas C. Kavanaugh, President, Chamber of Commerce
Mrs. Patricia Curran, Scarsdale Creche Committee
James Meehan, 914 Post Road
Richard Gast, President, Arthur Manor Association
Rev. Merlin Meyer, Trinity Lutheran Church
Mrs. Eleanor Kirk, Advisory Committee on Human Relations
Leonard Rubin, 34 Farley Road, appeared in opposition to granting permission to the Scarsdale Creche Committee.

Upon motion duly made and seconded, the following resolution was adopted by a vote of 4 to 1, Trustee Richman voting Nay:

RESOLVED: that for the year 1976, permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas season, and be it

FURTHER RESOLVED: that an appropriate sign be affixed to said Nativity Scene stating that it is erected and maintained by the Scarsdale Creche Committee, a private organization.

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The Deputy Village Clerk presented a communication from Mrs. Burnham Finney, Chairman, Public Affairs Committee, Scarsdale Woman's Club, commending the Board's efforts to get community reaction to the introduction of Cable TV through the appointment of a special committee and through the questionnaire in the Village Report and emphasizing that no public funds should be used, either directly or indirectly to introduce and support Cable TV.

The Mayor stated that there will be a special fee for Cable TV and that will be one of the things considered by the committee.

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The Deputy Village Clerk presented a communication from Ira Birnbaum of UA-Columbia Cablevision of Westchester stating that the company is interested in providing cable television service to residents.

The Mayor directed that the communication be noted and filed and a copy of the accompanying report be sent to the committee.

* * * * * *

The Deputy Village Clerk presented a communication from Mrs. Joan Israel, 17 Horseguard Lane, commending Tony Murgolo for

[Board Minutes]
knocked us out of schedule.

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Dep. Vill. Clerk: Communication from the Scarsdale Creche Committee requesting permission to erect a creche in Boniface Circle during the Christmas season.

Mayor: We have had a number of communications on this. The Creche Committee has requested that we allow them to put the creche up in Boniface Circle which is Village-owned land. We have received a communication from 10 clergymen in the Village suggesting that it might be more appropriate if

the creche was rotated among church properties in the Village and I believe that the Creche Committee has been informed of this but they have asked the Village to allow them to put on Village-owned property. We have a communication, as a result of a Board request to the Advisory Committtee on Human Relations, recommending that if a request is made by the Creche Committee to erect a nativity scene that the Village agree to the request. Any Trustees have comments?

Richman: I am confused. One of the churches on the list that the Creche Committee represented is on the list in the clergymen's letter, who say that the proposal is to move it to a location that is not public property.

Mrs. William Green, representing St. James the less: that was only if you do not allow it on Village-owned property.

Richman: I see that of the 7 churches represented by the Creche Committee at least 3 have creches on church property each year and I am not sure why they want it on public property too.

Mayor: No one has to justify their actions.

Gordon: You asked the Law Committee, together with the Village Attorney, to research the law. We have done so and the decisions we have found do not prohibit erection of a creche on public property, either school, town of U.S. Government provided that it is not an establishment of religion. The first amendment also prohibits the abridgement of free expression. If the governmental agency does not put it up it is not violating the first amendment. We would not be prohibited from granting permission provided they make arrangements, they erect the creche and see that it is taken down and if it is lighted they are responsible for paying for the electricity. Article 1, Section 3 of the laws of New York allows it. Both of these have caused judges to reach the conclusion that where tradition had allowed it on public property for a number of years to deny it because of some people would be what it says we should not do. We close schools, we close the Village Hall. It is a holiday and it is traditional to close government offices at this time of year. Under the circumstances the Law Committee feels it is one of policy, not law. None of the employees are to be responsible

for putting it or taking it down. There has been a suggestion from my fellow member of the Law Committee. In the District of Columbia when they considered the matter, the judge thought that it would be useful if there was some sign which indicated that the creche was erected by a private group and not a public authority. I would think that that could be a useful addition to the creche if there was a sign, in good taste, that indicated that it was erected by the Creche Committee.

Mayor: Are there any oral communications?

Leonard Rubin, 34 Farley Rd.: There is a case in Oregon where was held unconstitutional that a cross be erected on public land. Celebrating Christmas Day is because most people are Christian. It is improper to put the creche on public property. I question why a small piece of Village-owned land should be the one place for a religious display. There has to be separation of church and state. Taking this position now in determining whether or not it should be used for a religious display - the request should be denied. I suggest that it should be put over until

Mayor: Would you be opposed to the Chamber of Commerce installing Christmas lights?

Rubin: The creche should not be put up.

Gordon: We are not putting up anything. The permission for the use of Boniface Circle is not entirely improper. It is a Memorial to our war dead. We are not putting it up. We are considering a request for a Committee to put it up at a traditional time at a traditional place.

Mayor: Our Law Committee has advised us that we do not have a constitutional issue. Anyone else to be heard?

Cavanaugh, Chamber of Commerce: I have been instructed by the Chamber to report that the vote was 58 in favor of the creche being allowed to remain. There is another point. In Larchmont, after an emotion discussion stores were boycotted there on a basis of religion. We love Scarsdale and do not like to see it changes. It could be looked into again next year.

Mrs. Patricia Curran, Scarsdale Creche Committee.

(letter as read)

James Meehan, 914 Post Rd., representing I.H.M. in support of the creche — as read. The first creche erected in Boniface Circle was our creche. The Creche Committee borrowed it. We have had more than a passing interest in the creche. For 18 Christmas seasons the creche seemed to say peace to men of good will. Therefore I request you again grant the Creche Committee permission to erect the creche.

Richard Gast, 163 Johnson Rd., President, Arthur Manor Assoc.: We voted 11 to 0 to urge the Village Board to approve the Creche Committee's request.

Rev. Merlin Meyer, Trinity Lutheran Church: I met with the clergy and I know that they had written a letter requesting it be moved to their property in the interest of peace. There is no problem. In checking with the business community they made it clear that they did not want to see it moved because it is a tradition and it would cause disharmony if removed. The Jewish merchants felt it should not be removed. Certainly removing it would show prejudice. Any religious group can if they come to the Village with a request can have a symbol of their faith. At this time of year it makes for a feeling of joy and peace and I hope the Trustees will listen to our neighbors who hope you will let us keep the creche.

Eleanor Kirk: We made a recommendation to your Board and I wonder if we could read our contribution

(as read)

Mayor: Thank you. I might point out at this time that the Human Relations Committee is like the volunteer fire department. It is fortunate in this community that we have not had to use their services. We gather once a year and they say when do we get some action. It is only with an issue like this that a group such as the Human Relations Committee can provide us with advice. A request has been made to the Board to allow the Creche Committee to use Boniface Circle for the erection of the creche. I would entertain a motion that the creche be allowed with Trustee Gordon's amendment that an approved sign be requested indicating that this was installed by the Creche Committee and not the government.

Richman: I would like to speak to them separately.

Jensen: I move the approval of the Creche Committee's request.

Richman: I agree with Mrs. Kirk for harmonious relationships. I agree with Rev. Meyer the creche is not offensive. I would disagree to the extent that to deny the use of public property would be a limitation of your free exercise of religion. I think in spite of all the opinions tonight there are many people who share my view that the creche should not be on public property, not because of offensiveness, I think that the symbol of religion should not be on public property. I vote against the motion to grant permission.

Vote of 4 in favor, one against.

Mayor: Motion to put sign.

Jensen: Move sign, as a condition, indicating that it was put up by a private group.

Mayor: This creche has been erected and maintained by the Scarsdale Creche Committee, a private organization.

Richman: I think if you are going to grant permission it should be done.

Mayor: The creche will be allowed to be installed by the Creche Committee with that requirement.

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Dep. Vill. Clerk: Communication from Mrs. Burnham Finney, Chairman, Public Affairs Committee, Scarsdale Woman's Club commending the Board's efforts to get community reaction to the introduction of Cable TV through the appointment of a special committee and through the questionnaire in the Village Report and emphasizing that no public funds should be used, either directly or indirectly to introduce and support Cable TV.

Mayor: There is a special fee for Cable TV and that will be one of the things addressed by the Committee.

* * * * * *

Dep. Vill. Clerk: Communication from Ira Birnbaum of UA-Columbia Cablevision of Westchester stating the company is interested in providing cable television service to residents.

Mayor: Noted and filed and a copy of the accompanying report sent to the committee.

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Dep. Vill. Clerk: Communication from Mrs. Joan Israel, 17 Horseguard Lane, commending Tony Murgolo for taxi service.

Mayor: Mrs. Israel has commented on Mr. Murgolo's taxi service.

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Dep. Vill. Clerk: Notice of an application before the Planning

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Mayor: I do not think we should table it but if we have any information we should contact Audrey Hochberg.

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Mayor: Oral communications.

Feiner: I have always believed that it is the responsibility of the Board to answer communications. In my communication I urged you to consider the resolution to deny Village facilities to the Town Club and the Village Club.

Mayor: The reply we gave earlier. We have received it and since it does not require action we are tabling it and filing it.

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Payment to County Electric.

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Payment to City Refrigeration.

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Awarding contract on rescue tool
Roll call vote - all ayes.

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Budget modifications.
All ayes.

Mayor: This is a useful process. Many communities only do it at the end of the budget year. This is very useful.

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Water fees.
All ayes.

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Mayor: Financial report.

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Mayor: The Treasurer has filed paid Bond Anticipation Notes of the Library.

November 11,1977

TO THE VILLAGE BOARD
Scarsdale, N.Y.

The Scarsdale Creche Committee, representing the following churches:

St. James the Less
Scarsdale Baptist
Our Lady of Fatima
Church of St. Pius
Immaculate Heart of Mary
Grace Lutheran
Redeemer Lutheran
Trinity Lutheran

respectfully request permission to erect its Nativity Scene at Boniface Circle in the Village of Scarsdale, during the Christmas season of this year.
We appreciate the permission you have granted to us these past many years, and will appreciate again your permission to us, to again, erect our creche.

Respectfully submitted,
SCARSDALE CRECHE COMMITTEE

BY_____
Co-Chairman

BY_____
Co-Chairman
1 Rochambeau Road
Scarsdale, NY 1054

[Board Minutes 11/22/77]

The Deputy Village Clerk presented a communication from Mr. Joshua F. Greenberg, President of the Quaker Ridge Association, stating that a pathway on Griffen Avenue would add immeasurably to the safety of those in the community who bicycle, jog or simply walk along the busy street. He also stated that he knew of no homeowners who would object to this project even though at one time there was some opposition to it. He requested that he be notified of any additional hearings with respect to this matter.

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The Deputy Village Clerk presented a communication from the Scarsdale Creche Committee, 1 Rochambeau Road, requesting permission to erect a Nativity Scene at Boniface Circle during the Christmas season.

Trustee Gordon stated that this matter has been adjudicated before the United States District Court, Southern District of New York, before Judge Ward. He reported the Court's opinion in the case stating the Court had no jurisdiction over the case as presented. He further stated Judge Ward dismissed the matter.

Trustee Gordon recommended that the Board give the Creche Committee permission to erect the nativity Scene, with a sign stating the Creche is erected and maintained by a private organization.

Trustee Richman stated that she opposed the display of religious symbols of worship on public property.

After discussion, and upon motion duly made and seconded, the following resolution was adopted, Trustee Richman voting nay:

RESOLVED: that the Scarsdale Creche Committee is hereby permitted to erect a Nativity Scene on Boniface Circle with the following conditions:

1. That along with said Nativity Scene, a sign be erected to read as follows: "This Creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization."
2. That the Scarsdale Creche Committee shall do all the necessary work in erecting and taking down the Creche at no public expense.
3. That Boniface Circle must be restored to its previous condition after the Creche has been taken down and removed.

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The Mayor presented a communication from Lawrence C. Salley, Program Administrator, Westchester County, to Mr. Lowell J. Tooley, Village Manager, wherein Mr. Salley answered questions concerning the Urban County Community Development Program.

The Board discussed the risk involved if the Village joined the program and what it meant to the County if the Village joined.

The Village Manager stated that if the Village dropped out, $385,000 worth of Federal Aid would be lost to the participating municipalities in the Urban County Program.

Mr. Salley appeared and stated that the deadline for submission in the program is December 15, 1977. He also stated the Village would incur no financial risk by participation, and that the program is effective for only one year. The Village would have no commitment to continue in the program after that time if they so chose.

After discussion, Trustee Richman moved and Trustee-Jenser seconded the following:

RESOLVED : that the Village enter into an agreement with the Urban County Community Development Program.

The motion was defeated; Mayor Szabad, Trustees Jensen and Richman voting aye and Trustees Brennan, Browning and Gordon voting

[Board Minutes 12/13/77]

The Mayor stated the matter will also Personnel Committee.

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The Deputy Village Clerk presented a communication from Mr. William G. Paddock, Chairman of the Special Events Committee of the Town Club, inviting Village Officials to their 46th Annual Christmas Carol Sing to be held at Village Hall on Sunday, December 18, 1977 at 6:00 P.M.

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The Deputy Village Clerk presented a communication from Mrs. John J. Curran, 1 Rochambeau Road, expressing thanks on behalf of the Scarsdale Creche Committee for the Board's permission to erect the Nativity Scene on Boniface Circle. Mrs. Curran stated that the conditions listed in the letter she received from the Village will be adhered to.

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The Deputy Village Clerk presented a communication from Mr. Stanley Schear, Chairman of the Committee of Transitional Services for Westchester County, requesting that his name be considered for membership on the Advisory Council for the Handicapped.

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The Deputy Village Clerk presented a communication from Adrienne Lefkowitz, Renee Blau and Carolyn Levy stating that they cannot be forced to rely on private bus service to Quaker Ridge School because of the astronomical cost involved. A pathway must be constructed on Griffen Avenue before the next school year.

The Board discussed the proposed pathway project along Griffen Avenue as to whether a decision should be made at this time or have it considered as part of the Village's normal budget preparation review process.

[Board Minutes 12/9/80]

SCARSDALE CRECHE COMMITTEE

November 17, 1980

Village Board of Trustees
Scarsdale Village Hall
Scarsdale, New York, 10583

Dear Mayor Jensen and Village Trustees:

Last year's recommendation by the Village Trustees to the Scarsdale Creche Committee to consider placing the Creche on church property on a rotating basis was also requested this month by the Advisory Council on Human Relations. The Scarsdale Creche Committee met on November 12th to discuss this possibility and it was agreed that this suggestion was not the choice of the committee. A motion was made, seconded and unanimously accepted to erect the Creche at Boniface Circle.

Therefore, on behalf of the Scarsdale Creche Committee, I am once again asking permission to erect the Creche on Boniface Circle. You can be assured that the conditions set up in the past few years will once again be followed.

If permission is granted, the Creche would be set up on December 17th, weather permitting, and removed as soon as possible after the New Year, again, weather permitting.

Sincerely yours,

for The Scarsdale Creche Committee

Mrs. John J., Curran
1 Rochambeau Road
Scarsdale, New York 10583

Mayor Jensen has asked that Mrs. Curran supply the names of all Committee members and the Houses of Worship they represent.

Mayor Jensen asked for suggestions from residents who were present, receiving none, he stated that it was the sense of the Board to participate in the Urban County program of Home Rehabilitation Loan and Grant Program for the 1981/82 program year.

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The Deputy Village Clerk presented the following written communications that were received by the Board.

Chris Schroeder, President of the Junior Class of the Scarsdale High School has written to the Board of Trustees requesting permission to hang a banner in Chase Road Park for the Junior Class Crafts Fair to be held from December 10th to the 12th.

The matter was referred to the Manager's Office for consideration.

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Patricia Curran, representing the Scarsdale Creche Committee, has written to Mayor Jensen concerning the placement of the creche at Boniface Circle during the Christmas season. She has included the list of persons on the Scarsdale Creche Committee and the local churches they represent.

Trustee Ullman presented the following statement concerning this request.

"We have before us tonight the request of The Scarsdale Creche Committee dated November 17 to erect their creche on Village property at Boniface Circle during the 1980 Christmas season.

"The creche has been placed in Boniface Circle every Christmas since about 1957. The figures are wood carvings made by a Scarsdale sculptor at a cost of $1,625 (1957 dollars) which was donated by a number of neighborhood churches.

"The creche is erected and maintained each year by the Scarsdale Creche Committee, a private organization which consists of representatives of certain churches in and around the Village of Scarsdale. It has over the course of time consisted, as far as I could ascertain, of representatives from eleven such churches, comprising all the Christian denominations in the Village except the Mormons and the Christian

Scientists. Some of these representatives are chosen by their pastors, others by their Guild, their Church Council or their Board of Deacons.

"Each of the churches represented on the Committee makes a small annual contribution to the Committee; these contributions cover all costs of the creche display. The Village maintains the park at Boniface Circle as public expense, but it incurs no added cost from the presence of the Creche.

"The land at Boniface Circle was acquired in 1931 from Scarsdale Improvement Corporation which dedicated it to the Village for park purposes only. The permission this Board had heretofore given to the Creche Committee is clearly not a violation of that restriction.

"In 1976 Mr. Leonard Rubin of Farley Road brought suit against the Village in Federal District Court to require removal of the creche on the ground that our authorization to display it on Village property was a violation of the 1st and 14th amendments as a "law respecting an establishment of religion". The suit was dismissed on jurisdictional grounds, and was never renewed. However, at least since that time, the annual request of the Creche Committee and this Board's affirmative response to it had brought forth a few vocal and sometimes eloquent statements in opposition, on constitutional grounds, both orally before this board and in the Letters to the Editor of the Inquirer.

"We have sought and obtained the opinion of our Village Attorney as to the legality of the course we have heretofore followed. He assures us that all available precedents hold that such use of public property is constitutional as long as the municipality takes no part in it and incurs no expense as a result of it. I am not persuaded that a high court may not one day come down on the other side of that question. For the present, however, we have to assume that the requested use is a legal one, notwithstanding the fact that we have been forewarned by Mr. Rubin that if we approved the request he is planning to bring suit again this year.

"The discussion which accompanied Mr. Rubin's suit in 1976 had one notable effect. It led the Scarsdale Congrega-

tional Church, Hitchcock Presbyterian Church and Greenville Community Church to withdraw from the Creche Committee. this hear they were followed by the Church of St. James the Less. The Creche Committee thus now represents seven churches, five within the Village and two outside of it. Only three of its present members actually live in the Village.

"The Board is acutely aware that there is opposition to the use of Village property for a religious Christmas display, not only on constitutional grounds, but on grounds of offense to citizens of other faiths. When the issue came before us a year ago, we granted the request of the Creche Committee, based on over 20 years of established Village tradition, but in so doing, we requested the committee to consider placing the creche this year on church property.

"Some months ago we requested our Advisory Committee on Human Relations under the Chairmanship of Lynne Clark to meet with the Creche Committee and attempt to reach a solution which would preserve good relations among all our citizens, in the interest of the Village as a whole. The groups did meet and had a full and free discussion of the situation. The Creche Committee is quite aware of the increasingly sensitive nature of their request in a communmity in which the non-Christian population now represents a very substantial although undefined percentage of our citizenry.

"The Committee feels that it is essential that the creche be displayed somewhere in downtown Scarsdale. It is for this reason that its display on church property is unacceptable to them, since no church property is sufficiently central or affords sufficient exposure, in their judgment. However, they were perfectly willing to consider the possible use of private property in the downtown area as an alternative, and the Council on Human Relations thereupon attempted to get the permission of several private owners for the creche to be set up on their property. All of their efforts proved unsuccessful.

"The Council thereupon requested the Creche Committee in writing to consider the church property alternative, at least two churches having offered the use of their grounds. The request was unanimously rejected by the Committee. On this state of

facts, the Human Relations Council then made its report to this Board. The report is available to the public. Although the council is about equally divided between members of the Jewish and Christian faiths, and although individual members of both faiths were opposed to the use of Village property for this purpose, the Council nevertheless *unanimously* recommended to us that we grant the request of the Creche Committee again this year. It did so in the belief that it would be even more damaging to good feeling in the Village to deny the request than to grant it.

"This is the posture in which the matter comes before us tonight. In order to put it into discussion I move, Mr. Mayor, that this Board accept the request of the Scarsdale Creche Committee for permission to erect its creche at Boniface Circle during the 1980 Christmas season, subject to the conditions previously obtaining, namely that the committee shall:

1. prominently display its existing sign which reads "This Creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization"
2. provide the Village with satisfactory liability coverage
3. erect, remove and clean up after the display at no cost to the Village."

Trustee Sims offered the following comments on the subject:

"Last year after the Board had voted to grant permission for a creche to be erected at Boniface Circle a motion was made and unanimously passed advising the Creche Committee that the Board deemed it advisable for the creche to be rotated in future years at various churches for the annual display. I count 14 churches in the Village. Five years ago 11 or 12 were said to have been members of the Creche Committee, today 7. Why the decline? When our Board recommendation on the creche was sent out last December a reply rejecting the recommendation was received so rapidly as to indicate that there could hardly have been time to consider or consult all the church ministers or all of its lay leaders. Apparently just the seven committee members. We have now learned that the Creche Committee includes only five Scarsdale churches out of the

fourteen and that it includes only three residents out of the seven members of the committee. It is natural of course for a committee to be vitally interested in its purpose. It is equally natural for a responsible local government to respond to that purpose in the light of its affect on all the community. I understand that an effort has been made to find private property owners whose location are as good or better than Boniface Circle who might be willing to permit display of the creche, at least a few were so inclined, but later declined, possibly because it might offend some customers. But these people already are our customers, our residents. The non-Christian population of the Village has been variously estimated to be between 25 and 50%. Those few thousand families have been content to be as good neighbors in regard to the Christmas display. Perhaps it is time now for the other few thousand families to be equally considerate and good neighbors. The golden rule works two ways."

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Trustee Brown made the following comments:

"My feelings are that after serious consideration, other Boards have appointed a superb Human Relations Committee, composed of people of different faiths and many points of view. This committee has done its homework diligently and has given us its considered recommendation taking into account all aspects of the situtation. Since I see no reason to discount their judgment, I therefore support this motion."

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Trustee Underweiser's comments:

"It seems this is the second year in a row where the Advisory Council has requested that the creche be placed on private property or on church property. After the second time, the Creche Committee met to discuss this possibility and has agreed that the suggestion is not the choice of the committee.

"We do have a divergent point of view here. Our Board appointed Council on Human Relations has twice suggested that the creche be placed on church owned property or on private property and apparently twice, it has been decided by the Creche Committee to reject the suggestion. It is true, and

this is what's making it very difficult for this Board, particularly for myself, that after this second rejection was received, the Advisory Council in its report to us as quoted by Trustee Ullman, advised that it may be more devisive to the community to deny allowing this long standing tradition. I think this is a very difficult issue that has been placed before this Board, I consider it an inappropriate one, I feel that the original suggestion of the Advisory Council is not being followed. This is my point of view at the moment."

Trustee Stone stated that she agreed with Trustee Underweiser—that every reasonable suggestion has been made to the Creche Committee to place the creche on church property. They have seen, in their judgment, to turn down the recommendation, and I will oppose their request this year."

A vote by the show of hands was taken and the request was approved by a four to three vote. Trustees Brown, Browning and Ullman and Mayor Jensen voted Aye, Trustees Sims, Stone and Underweiser voted Nay.

RESOLVED: that the Scarsdale Creche Committee is hereby given permission to erect a Nativity Scene on Boniface Circle during this Christmas season with the following conditions:

1. that along with said Nativity Scene, a sign be erected to read as follows: "This Creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization."
2. that the Scarsdale Creche Committee shall do all the necessary work in erecting and taking down the Creche at no public expense.
3. that Boniface Circle must be restored to its previous condition after the Creche has been taken down and removed.
4. that liability insurance be provided to the satisfaction of the Village Attorney.

* * * * * *

[Board Minutes 11/10/81]

Scarsdale Creche Committee

November 2, 1981

Village Board of Trustees
Scarsdale Village Hall
Scarsdale, New York 10583

Dear Mayor Stone and Village Trustees:

Again this year the Advisory Councuil on Human Relations asked the Scarsdale Creche Committee to consider a privately owned site in the downtown area of the village for the erection of the Creche. We agreed to place the Creche on the property suggested but the response on the part of the business people involved was negative.

Therefore, on behalf of the Scarsdale Creche Committee, I once again request permission to place the Creche on Boniface Circle with the assurance that all the conditions set up in past years will be followed.

We would plan to set the Creche up on Thursday, December 17th, weather permitting, and would remove it as soon as possible after January 1, 1982, again, weather permitting.

The following is a list of the churches and their representatives who are members of the Creche Committee:

Church	Representative	Address
Immaculate Heart of Mary	Patricia Curran (Chairman)	1 Rochambeau Road Scarsdale
Trinity Lutheran	Cynthia Barsuhn	307 Boulevard Scarsdale
St. James the Less	Constance Dohrenwend	6 Paddington Road Scarsdale

Church	Representative	Address
Church of the Good Shepherd	Dorothy Revelli	11 Kolbert Drive Scarsdale
Grace Lutheran	Doris Adler	123 Brambach Road Scarsdale
Church of St. Pius	Mary Tully	23 Leatherstocking Lane Scarsdale
Scarsdale Community Baptist	Joan Mann	24 Sherwood Place Scarsdale
Our Lady of Fatima	Maria Pedulla	63 Brendon Hill Road Scarsdale

Sincerely yours,

for the Scarsdale
Creche Committee

Mrs. John J. Curran
1 Rochambeau Road
Scarsdale, NY 10583

[Board Minutes 11/10/81]

WHEREAS: the Advisory Council on Cable TV is the agency most familiar with this operation, now therefore be it

RESOLVED: that the Board of Trustees of this Village hereby authorizes and directs the Advisory Council on Cable TV to hold the public hearing required by Section 25.2.2 of the franchise agreement to consider the request of UA-Columbia Cablevision of Westchester, Inc., for an increase in subscriber rates, and the Board further authorizes and directs the Advisory Council on Cable TV at the conclusion of such hearing to report

its findings and recommendations to the Board of Trustees for action by the Board.

ORAL COMMUNICATIONS:

Paul Feiner of 15 Parkfield Rd. appeared before the Board concerning his proposal to establish a bus route between the Village and the City to help alleviate the crowded commuting situation on the railroad. He stated that a working meeting would be held at his home on November 19th to discuss the matter.

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Jessie Fiedler Co-President of the Village Club appeared before the Board concerning the proposed development of the Freightway area. She stated that it was the opinion of the Village Club that the basic goals of the Village, as stated in the Requests for Proposals, had not been met by the Polera proposal and they urged the Village to drop the Polera proposal, and to proceed to other alternatives for development of the Freightway property.

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Martin Roth of 33 Black Birch Lane appeared before the Board and presented a statement on the proposed location of the creche during the Christmas season. He was opposed to it being located at Boniface Circle stating that in his opinion, this was a violation of the first amendment to the U.S. Constitution.

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Lynne Clark, Chairman of the Advisory Council on Human Relations, appeared before the Board and read a letter from Peter Strauss, a member of this Council, concerning the placement of the creche at Boniface Circle.

It was Mr. Strauss' recommendation that approval be given to the Creche Committee to place the creche at Boniface Circle this season but that the Creche Committee must demonstrate a genuine effort to find an alternative site for next year otherwise the Board of Trustees would not look favorably upon its

request in 1982.

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Mr. and Mrs. James O'Connor of 141 Bradley Road appeared before the Board in support of the creche being located at Boniface Circle.

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Warren Grossman of 90 Mamaroneck Rd. appeared before the Board concerning the traffic light at Murray Hill and Mamaroneck Rds.

Village Manager Tooley explained that the matter was being studied and the light will be repaired if replacement parts are available.

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Lynne Clark, Chairman of the Advisory Council on Human Rights, appeared before the Board with the following recommendation from the Council concerning the placement of the creche during the Christmas season.

"Members of the Council believe that the creche should be placed on non-public property and have continued to encourage the Scarsdale Creche Committee to seek sites other than Boniface Circle or to withdraw their request. As no other locations are available in the center of the Village where the creche can be seen easily and church sites are not acceptable, the Creche Committee will bring their request again to the Village Board. The majority of the Council believes that it is less devisive to good community relations to allow this long standing tradition to be maintained rather than to deny permission. Therefore, the Council makes the following recommendation:

The Advisory Council on Human Relations recommends that the Village board of Trustees accept the request of the Scarsdale Creche Committee to erect its creche at Boniface Circle during the 1981 Christmas season."

* * * * * *

Trustee Bowen read the following statement concerning location of the creche:

"This is the first year I as a member of the Village Board have had to address myself to the question of whether or not to permit the Creche Committee to erect their display at Boniface Circle. I have been in attendance at the Village Board meetings over the last two years when this subject has been discussed. The personal feelings and deep concern of the then Trustees and Mayor speaking to both sides of the issue has been obvious. The decision reaches deep into emotions. There are no right answers; no matter how one votes on this issue someone will criticize that vote. And that criticism more than likely will have a justifiable base. It is sad that a dispute surrounds a display intended to express good will.

"No one on this board, as far as I know, is against the display of the creche. The issue is one of allowing a religious display on public property. The creche has been displayed at Boniface Circle since 1957. Since 1976, the permission to grant that display has been challenged, both in court, where the suit was dismissed on jurisdictional, not substantive, grounds, and before this board and in the press by a small but persistent and very persuasive group of residents and neighbors. It has been stated both formally and informally that there are many others in the community against the idea of allowing the creche to be displayed on public property who have refrained from speaking out so as not to cause dissension. Similarly, there are many who approve of the display who have remained silent as long as permission from the Village Board has been forthcoming.

"The Village Board, seeking guidance, has turned to its Advisory Counsel on Human Relations and asked them to look for a solution which would preserve good relations among all our citizens and to recommend to this Board a course of action which would be in the interest of the Village as a whole.

"The Council has been diligent in its efforts to find a satisfactory resolution. It has met often with the Scarsdale Creche Committee, with representatives of the various supporting Churches, and with representatives of private commercial establishments in an attempt to find an alternate site to Boniface Circle. And, most importantly, it has met as an

advisory committee to evaluate the situation year-to-year and, based on that discussion, to make a recommendation to this Board.

"The membership on The Human Relations Council is diverse and the personal opinions of its individual members differ, not necessarily aligned by religious belief. Yet, in spite of their personal feelings on the issue, the Council again this year has recommended unanimously that it remains in the best interests of the Village to allow the Scarsdale Creche Committee to erect their display at Boniface Circle.

"The Village Board depends very heavily on input from its advisory councils; yet it is not incumbent on us to automatically accept recommendations from those councils. Here, however, we have a recommendation based purely on a subjective issue. There are no hard facts to dispute —

— To the best of my knowledge there has been no change in the legality of the proposed action to cause a reversal of a position that has been accepted for 23 years.

— Further, there has been no appreciable change in the public record of community sentiment either pro or con.

"We have here an issue that brings forward deep convictions yet that must be resolved by the considered subordination of one's personal feelings. To one's perception of what is best for the common good.

"On this basis, I believe strongly that it is incumbent on us as Trustees to accept the advice of our Advisory Council. We have delegated to it a responsibility. It is one I am more than convinced has been addressed with compassion and diligence. The Council reflects, as best it can, community sentiment. In the absence of specifics that might dictate against accepting its conclusion, we should follow its recommendation."

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Trustee Sims read the following statement concerning the location of the creche.

"For years, there has been widespread unease in Scarsdale about the use of Village property fror the display of the creche. What kind of peace or goodwill can there be when members of other religions are annually offended by a theological display?

Offering the objectors the same right to erect a representation of their own does not respond to their objection.

"For the more than years that I have lived here, not I nor anyone else that I know, has objected to the creche per se. The objection is to its location — happy that our Christian friends enjoy it. And I can understand that Creche Committee would want the location that provides maximum exposure. But at what cost? Are the consequences of offending many neighbors so trivial that you must persist? It seems to me, therefore, that the neighborly thing to do is to place the religious symbol on church property. Two years ago, this was the unanimous recommendation of the Board of Trustees and chnurches did indeed offer their property for this purpose.

"Our Advisory Council on Human Relations has explored the problem at length. Their conclusion for the last two years was that the creche display had become a tradition after more than 20 years and that it would be more damaging to good feeling in the Village to deny the request than to grant it. I would ask us to address what we mean by "tradition".

"Independence Day, July 4th, is a tradition that all of us know and enjoy and in which many of us participate. Everyone here also knows that the Day of Atonement, Yom Kippur, is a tradition. But only for the Jewish people. Just as a creche is a tradition for the Christian people. Twenty years later, the creche is still not a tradition for me any more than Yom Kippur is a tradition for you. The recommendation, therefore, does not hold. It confuses tradition with habit or repetition. And the longer we maintain the habit, the more difficult it will be to end it.

"Out of respect for your neighbors, I urge you to end it tonight."

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Trustee Brown stated that although she had prepared a statement on the creche issue, her feelings were adequately stated in Peter Strauss' letter (copy on file).

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Trustee Ullman stated that there is no right answer to the creche matter – "As I see it, this is not a legal problem. It is

clear that as long as public property is not made available for religious use in a manner which entails public expense that there is no violation of the prohibition against supporting the establishment of religion. I think what we have here is an issue of human relations and here I agree with Trustee Bowen's opinion that since we have appointed an Advisory Council on Human Relations, which is very well represented in the population of this Village, and which is certainly a dedicated, hard working body which has agonized over this issue year after year, I think it is incumbent on us to follow their advice. I see no basis on which we could substitute our opinion for theirs. I think if I had a firm conviction that there was as much unhappiness about this situation as some people say, I might change my opinion. But I must say that I have not had one phone call on this issue, I have never heard really any great agitation on either side of the issue. And my own feeling is that we should continue in the tradition, or habit, which Scarsdale has followed for the last 15 or 20 years."

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Trustee Falkenberg stated: "I think the creche should not be allowed. Although attractive to some, I believe it is not congruent with the separation of church and state. The alternatives of church property appear only marginally less attractive than Boniface Circle. Further, I believe that acceptance of the tradition without re-examination is totally unacceptable."

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Mayor Stone asked for a roll call vote to accept or reject the request of the Creche Committee to place the creche at Boniface Circle during the Christmas season.

Those in favor of granting the request of the Creche Committee:

Trustee Bowen
Trustee Brown
Trustee Ullman

Those opposed to granting the request of the Creche Committee:

Trustee Falkenberg

Trustee Sims
Trustee Underweiser
Mayor Stone

Mayor Stone made the following statement: "This has been a very difficult decision for each one of us. In the past years that I have served on this Board, I have voted both ways reflecting my own personal difficulties in trying to determine what is the correct, the right course of action without regard to my personal beliefs and political ramifications or any consideration of legal action. These have been no part of my deliberation or decision.

"The Advisory Council on Human Relations, in their recommendation to us, stressed their strong preference to have this nativity display on private property. It is their concern for community feeling and interaction that prompts their recommendation to us. I am very mindful of all their efforts and I am grateful to them, in particular to Mrs. Clark, their Chairman, for their sensitive study of this subject. I am deeply appreciative that they undertook the additional responsibility to try and find a private site in the Village on which to place the creche. Even though I realize their roll is designed to be only advisory, it is particularly difficult for me to vote against their recommendation — one of our own councils. Regretfully, however, I must do so, in the belief that this refusal by the Village Board in not granting the Creche Committee's request, is not asking the Creche Committee to remove the creche, but merely to move it. It is the question of location of the creche not the tradition that has great meaning to many in the community. There is a real question in this community, a question that has been expressed by many of all faiths, as to the proprietary and the judgment of permitting any religious display on Village property. There is a viable and appropriate alternative — the use of any of several suitable church properties. It is with these two bases in mind and with the hope and the request that the Creche Committee will elect to go this direction that I vote to deny the request of the Creche Committee."

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The following written communications were presented by the Deputy Village Clerk:

Alan Jaffe of 101 Greenacres Avenue wrote to Mayor Stone expressing his thanks for the Board's quick response to the plea of Greenacres residents to re-open Walworth Avenue. He stated his confidence in the Board reaching a solution that will consider the interests and needs of all the residents of Greenacres.

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A letter was received from Matthew Martin, son of Mr. and Mrs. Martin of 23 Tunstall Road complaining about vandalism on Halloween night — specifically to their two cars that were sprayed with paint remover. He wanted parents to be aware of what their children are carrying around on the streets and also to stress that both the youngsters and the parents are responsible for this kind of damage.

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Trustee Ullman asked that a public hearing be called to consider adoption of Local Law Introductory #3 for 1981, which would amend the Scarsdale Village Code in relation to garbage and bulky waste.

Upon motion duly made by Trustee Brown and seconded by Trustee Sims, the following resolution was adopted unanimously:

RESOLVED: that the Board of Trustees of the Village of Scarsdale hereby calls for a public hearing to be held at its regular meeting of December 15, 1981, at 8:15 p.m. E.S.T. at Rutherford Hall in the Village Hall for the purpose of considering the adoption of Local Law Introductory #3 for 1981, which would amend the Scarsdale Village Code in relation to garbage and bulky waste.

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[Board Minutes 11/24/81]

FURTHER RESOLVED: that the Village Manager is authorized and directed to execute a contract and all other documents necessary to acquire such title on behalf of the Village of Scarsdale, which contract and documents are to be subject to the prior approval of the Village Attorney.

AYES	NAYS	ABSENT
Trustee Bowen	None	None
Trustee Brown		
Trustee Falkenberg		
Trustee Sims		
Trustee Ullman		
Trustee Underweiser		
Mayor Stone		

* * * * * *

Mayor Stone announced that a petition had been received containing 500 signatures of residents concerning the location of the creche. Also letters had been received from 23 individuals concerning this matter. The Board had also received a great deal of support and encouragement for the position that it took (denying the Scarsdale Creche Committee permission to locate the creche at Boniface Circle during the holiday season).

Mayor Stone also stated that all signed letters received had been distributed among the members of the Board of Trustees.

Patricia Curran, representing the Scarsdale Creche Committee appeared before the Board stating:

"The Scarsdale Creche Committee is grateful to the overwhelming number of residents who publicly expressed their dismay at not being able to view the creche at Boniface Circle this year.

"The Committee welcomes Mr. Durning's offer to place the creche on the property of the Frog Prince Proper for the 1981

Christmas season. We are aware that this site may not be available to the Creche Committee in the future since the Frog Prince Proper property is presently up for sale. Therefore, the committee hopes the Village Board will establish a policy which will make Boniface Circle the traditional home for the creche available in the future as it has done for the past 24 years.

"In addition, I have three other petitions with a total of 213 names to present to the Clerk."

Mayor Stone stated "I am sure that I can speak not only for myself, but for each member of this Board in expressing our appreciation to Mr. Durning for his coming forward with an offer truly in the spirit of the holiday. And our delight and further appreciation to the Creche Committee for their acceptance of this site to erect their creche this year. I think that all of us on the Board feel that it is a suitable and beautiful location for the creche and a timely and a welcome resolution."

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Robert J. Walsh of 11 Elba Place, Eastchester, appeared before the Board concerning the creche matter.

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Kevin Healy of 184 Madison Road appeared before the Board concerning the location of the creche and other matters relating to religious displays on public property.

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Warren Grossman appeared before the Board concerning the repair of the traffic light at Mamaroneck Road and Murray Hill Rd.

Mayor Stone informed Mr. Grossman that the subject was on the agenda of the Finance Committee for consideration.

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Howard Terriss of 2 Rectory Lane appeared before the Board concerning this same traffic light and also to announce a meeting of the Scarsdale Civic Club on December 9th to discuss the proposed Freightway development. The guest speaker will be Village Architect Donald Newman.

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Paul Feiner of 15 Parkfield Rd. appeared before the Board concerning the Freightway development. He suggested that a Village-wide advisory referendum be held on March 16th at the time of the Village election to determine the use of the Freightway property.

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The following written communications were presented by the Deputy Village Clerk:

Margaret D'Arcy of 7 Barry Road wrote to the Scarsdale Police Department thanking them for the assistance they gave when her husband became ill. She said the patrolmen were most considerate and capable — she needed help and they provided the best.

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[Board Minutes 11/23/82]

Scarsdale Creche Committee

October 25, 1982

Village Board of Trustees
Scarsdale Village Hall
Scarsdale, New York 10583

Dear Mayor Stone and Village Trustees:

On behalf of the Scarsdale Creche Committee, I once again ask your permission to erect the Creche on Boniface Circle. All conditions set up over the past years will be carried out by the committee.

If permission is granted, the Creche will be set up on December 16, and removed as soon as possible after the New Year.

Sincerely yours,

for the Scarsdale Creche Committee

Mrs. J. J. Curran
1 Rochambeau Road
Scarsdale, New York 10583

Paul Feiner of 15 Parkfield Road appeared before the Board concerning the bus service being offered into New York City by Vanguard Bus Co. He stated that the Village Manager had requested that these buses not run on Fox Meadow Road because of their size and noise and the fact that Fox Meadow Road is not a truck route. Mr. Feiner asked that the Village allow the buses to run on Fox Meadow Road through December.

Village Manager Tooley asked Mr. Feiner to meet with him to discuss the matter and try to work out a solution to the problem.

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John Goodman of 225 Madison Road appeared before the Board concerning this bus service.

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Dr. J. Carroll of 182 Garth Road appeared before the Board concerning the placement of the creche at Boniface Circle. It was her opinion that the law favored the use of Village property for such a use.

Mayor Stone informed Dr. Carroll that as yet no action had been taken by the Board concerning the creche matter.

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Lynne Clark, Chairman of the Advisory Council on Human Relations, presented the following statement regarding the Creche at Boniface Circle.

"The Advisory Council on Human Relations appealed once again to the Scarsdale Creche Committee to eliminate the Creche controversy by not bringing their request to the Village Board of Trustees and by finding a permanent non-public site for the display. The Council's concern is the harmony of all the people of Scarsdale. There was no doubt in the minds of all Council members that the recommended action to the Scarsdale Creche Committee would be in the best interests of the

Village. Any other path would lead to more controversy, more acrimony between residents of opposing views, more unpleasant publicity for the Village, the likelihood of expensive legal action and lasting bitterness.

"Unfortunately, as in the past, our unanimous and earnest plea did not dissuade the Creche Committee. Accordingly, as asked by the Trustees, the Advisory Council on Human Relations voted on whether or not to recommend to the Trustees granting the request. This was a most agonizing choice. Either "yes" or "no" causes a loss. It is a no-win situation.

"The Council was split on this issue. Three recommended denial. Five recommended approval. Those who recommended approval expressed the hope that, by proceeding with the display, a likely suit would result in a comprehensive and final hearing on the matter in a court of law, thereby freeing the people and their elected officials of what has been a chronic, holiday season, emotional crisis. Both "yes" and "no" members sought the same objective, each believing the path selected would more likely establish a permanent undisputed pattern. This objective was our central concern. Other issues of philosophy or morality or politics were considered less important than permanence as a determining factor in stopping annual discord. The "no's" believe the Trustees can accomplish this result. The "yes's" believe the Trustees cannot accomplish this result but that the court will, one way or the other."

Mrs. Clark gave the following information, in addition to her prepared statement. "I would like to mention two additional pieces of information that have become known to me. 1. Mr. Durning has offered the Frog Prince property again this year for a display of the creche. 2. The Baptist Church on Popham Road has also offered their property for this purpose."

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Mayor Stone expressed her appreciation and that of the Board for the efforts put forth by the Advisory Council on Human Relations on this matter.

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Mayor Stone presented the following statement on the creche matter.

"The Board of Trustees received yesterday a memorandum, an opinion of law, from a member of our Law Committee which I had requested, dealing with the constitutionality of approving or denying this request.

"This is a long document mentioning various cases, and we wish to consider it most carefully. The Trustees are unanimous in their decision, as is the Village Attorney, that the better course would be to postpone a decision, to vote on the Creche Committee request until the Law Committee has had sufficient time to read some of the statements that are referred to in that document as well as to instigate other legal research looking at different opinions and cases that I understand are available to them.

"I would also like to say that we would welcome any legal input from any of you as well to our Law Committee.

"I think everyone is in agreement at least that permanent legal clarification of this issue is in the Village's best interest and indeed I welcome such a clarification by any route. I wish these questions had been addressed in previous years but they were not. They have been raised now and should be examined. Perhaps as much as anyone in Scarsdale I would have liked to call for a vote tonight and put this behind us and proceed to work constructively for a happy holiday season. But like the other Trustees I do not feel ready to do so. In fairness to the Creche Committee and to our local merchants we want this sensitive issue resolved as soon as possible but we must allow sufficient time for further consideration.

"Our next scheduled meeting is December 14th which is too close to Christmas. So I am recommending that we call a special meeting of the Board of Trustees on Wednesday, December 1st to resolve this matter. I am further requesting that before the meeting our Law Committee meet with the Village Attorney, and subsequently to report back to the Board of Trustees and myself with their findings.

"The unavoidable absence tonight of Trustee Ullman, who has just returned from the hospital, also contributes to our thinking on postponing final action. We all prefer the participation of this full Board if possible, in resolving this question. Any of you, who have responses to Trustee Glendon's recommendation should be submitted by next Monday."

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Mr. Rubin appeared before the Board asking when Trustee Glendon's statement would be available for the public. Mayor Stone replied that it would be available from the Clerk's office tomorrow. It was his opinion that the Village should deny the Creche Committee's request.

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Patricia Curran of 1 Rochambeau Road appeared before the Board asking for a copy of Trustee Glendon's report. She commended Mayor Stone and the Board of Trustees for the time and effort they had given to this matter.

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The following persons appeared before the Board concerning the creche issue:

Kevin Healey	184 Madison Rd.	In favor of request.
Edna Golden		Opposed to request.
Dr. Carroll	182 Garth Rd.	In favor of request.
Edward Cousin	28 Thornbury	Opposed to request.
Marvin Fink	112 Brewster Rd.	Opposed to request.

Evelyn Carnicelli of 6 Tunstall Road appeared before the Board concerning the use of mini-bikes on Village streets by young children.

Mayor Stone replied to Mrs. Carnicelli stating that the problem would be investigated.

* * * * * *

Burton Fendelman of 1248 Post Road appeared before the Board asking if Boniface Circle had ever been used before for non-Village use.

He was told that it has been used in the past by the American Legion, Boy Scouts, Red Cross and the United Way.

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Paula Feiner of 15 Parkfield Road again asked about the bus service on Fox Meadow Road.

Mayor Stone stated that Mr. Feiner would hear from the Board about his concern that the bus be allowed to run on Fox Meadow Road at least through December.

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Upon motion duly made by Trustee Glendon and seconded by Trustee Brown, the following resolution was adopted unanimously:

RESOLVED: that an Executive Session is hereby called to discuss litigation matters.

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Mayor Stone reported on "Raccoon Night" stating that 120 residents were present at the meeting. The staff is preparing an information packet that should be ready for distribution on December 1st.

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The Deputy Village Clerk presented the following written communications.

Jessie Fiedler and Renee Pessin, Co-Presidents of the Village Club wrote to the Board of Trustees concerning the Village's procedures for holding public hearings.

They suggested that certain changes be made so that various Village organizations could deal more effectively with issues that are brought before

[Board Minutes 12/1/82]

VILLAGE OF SCARSDALE
BOARD OF TRUSTEES
SPECIAL MEETING

DECEMBER 1, 1982

A special meeting of the Board of Trustees of the Village of Scarsdale was held at Rutherford Hall in the Village Hall on Wednesday, December 1, 1982, at 8:15 p.m. E.S.T. Those present were: Mayor Stone, Trustees Bowen, Brown, Falkenberg, Glendon, Ullman and Underweiser. Also present were

Village Manager Tooley, Deputy Village Clerk Watson and Village Attorney Holden.

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Mayor Stone convened the meeting with a reading of the emergency fire exit notice.

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Mayor Stone stated that this was a special meeting of the Board of Trustees called to act on a specific item on which action was postponed to give Board members additional time to familiarize themselves with the legal background aspects that might have a bearing on the Board's response to the Creche Committee request to display the creche at Boniface Circle.

Mayor Stone read the following statement:

"Because this is a special meeting, the usual order of business will not be followed. There will be no minutes, reports, written or oral communications and we will proceed directly to the subject at hand.

"For your information, all written communicaztions on this subject that we have received, have been circulated to Board members as recently as of today and will continue to be so.

"I want to thank wholeheartedly Trustee Glendon and Trustee Underweiser for the prodigious amount of time and labor they put in on behalf of this Board. I also thank Trustee Ullman for his efforts, in the hospital and out, as Chairman of the Law Committee. I also greatly appreciate the legal input and interest of others of our community which this Board has welcomed.

"I would be remiss, however, as head of this Board if I did not publicly repudiate statements in one of these communications, suggesting that Trustee Glendon's presentation was misrepresentative, selective and intentionally deceptive. While we may not agree on our positions, to suggest that Trustee Glendon's work was prepared in any manner other than forthrightly and decently with the intent to inform this Board, is simply an unacceptable and hostile premise which I, and I think this Board refutes.

"Trustee Ullman, I am passing the podium to you."

Trustee Ullman read the following statement:

"It is the function of the Law Committee to advise the Board pertaining to matters of law.

"In our deliberations with respect to this application, we have had the benefit of a mass of legal material, some of it solicited, some unsolicited, and some independently researched, to help us determine our constitutional imperatives and to evaluate the able memorandum submitted to the Board by Trustee Glendon. We are grateful to all who have provided us with this material, which has been simultaneously made available to all members of the Board and not only to this Committee. All of us have spent many hours analyzing and evaluating.

"The applicaztion of the establishment and free exercise clauses of the first amendment is as the United States Supreme Court has repeatedly stated, 'a particularly difficult and complicated task', and the making of fine distinctions is as the court has also said 'of the esence of establishment clause analysis'. It is perhaps not surprising, therefore, that there is no unanimity among members of the Law Committee.

"Consequently, we are not in a position as a Law Committee to give a clear direction to the Board. Each of the Trustees has heard the views of the individual members of this Committee and will vote tonight on the basis of whatever considerations, not only legal, but moral, political or pragmatic, seem to them compelling. We vote as a legislative body and not as a court of law.

"This area of the law is one in which there is a new spate of litigation and controversy and in which new law is being made. It may well be that in another year we will have an authoritative determination on fairly comparable facts. I think we can all agree that it is undesirable for Scarsdale as a community to be the test case in this situation. Our involvement in a suit over this issue would be very expensive for Scarsdale taxpayers and would be politically and socially destructive. We do not need it. For that reason, I would personally appeal once more to the Creche Committee in case the Trustees grant them the permission they seek, and I don't

know which way this vote will go tonight, and that they elect voluntarily to relieve the Village of dissension by accepting Mr. Durning's offer to place the creche on his property on Chase Road."

Mayor Stone asked Trustee Bowen to move the resolution:

Upon motion duly made by Trustee Bowen and seconded by Trustee Brown, the following resolution was presented:

RESOLVED: that the application of the Creche Committee to place the creche on Boniface Circle be approved by this Board.

Trustee Glendon made the following statement before the vote was taken.

"Mayor Stone, fellow Trustees, my discussion will be very limited. I have set forth my views on the Constitutional implication of this problem in a memorandum dated November 22, 1982. I supplemented that memorandum with a second memorandum with additional information dated November 29, 1982, in which I pointed out that the Village before the Federal Court in 1977, took the position that permitting the creche to be placed on Boniface Circle did not violate the establishment clause. I added that in that same brief the Trustees represented to the court that 'the Board of Trustees permitted a group of residents to use Village property in the same manner as it would permit any other similar group seeking such position'. I did not have this information available for my first memorandum.

"I will not labor or bore you with the subject, I would simply like to say that I repeat, I reallege, I reincorporate my views as I expressed them in that memorandum. I have carefully examined the other memoranda that have been submitted and I say again, I repeat, reiterate and reincorporate my views with more conviction than I did the first time.

"I might simply comment on one case which was brought before you as somewhat apposite, with which I disagree, and that is — the case of ACLU of Georgia versus Rabun County Chamber of Commerce, decided by the Eleventh Circuit, June

21, 1982. That case involved the erection by a private group of a twenty-five foot cross, permanently erected on a mountainside in I believe Georgia. It was accompanied with two flood lights which permanently illuminated the parkground within which this cross was erected. Thus we have a twenty-five foot cross located permanently in a parkground illuminating the nocturnal activities of the citizens of the park, for good or evil, on a permanent basis. Somehow I find no equation between that and what is asked here."

No other Trustees desiring to make statements, Mayor Stone called for the vote:

The resolution was defeated by the vote indicated below:

AYES	NAYS	ABSENT
Trustee	Trustee Brown	None
Trustee Glendon	Trustee Falkenberg	
Trustee Ullman	Trustee Underweiser	
	Mayor Stone	

* * * * * *

meeting adjourned: 8:30 p.m.

Avis A. Watson

Deputy Village Clerk

[Board Minutes 12/14/82]

William McCreery, President of the Town Club appeared before the Board concerning the 1983/84 Village budget. It was the Town Club's executive committee's opinion that the overall target for a Village tax increase should not exceed 4%. Also, they recommended that a 5% limit be placed on salaries, wages and fringe benefits for Village employees. Mr. McCreery's complete report is on file.

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Paul Feiner of 15 Parkfield Road appeared before the Board asking if the Village had done anything to encourage Village employees to participate in the employees award program. He also suggested expanding this program to include all Village employees, not just clerical workers.

Mayor Stone replied by saying that they would get back to him later with the information he had requested.

Mr. Feiner also suggested that the Board of Trustees adopt a resolution stating their opposition to a rate increase for the MTA (Metropolitan Transportation Authority). He also asked that an Ad Hoc committee be formed to study the transportation problem.

Trustee Glendon informed Mr. Feiner that the Board was actively engaged in forming such a Board and hoped to be able to report on it at the next Board meeting.

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The following persons appeared before the Board concerning the placing of the creche at Boniface Circle for the holiday season:

Charles Butler, 216 Madison Road, Eastchester
Kevin Healy, 184 Madison Road -
Richard Gast, 163 Johnson Road -
Mrs. Gregory Thompson, 46 Jefferson Road -
Robert McCreary, 10 Southwoods Lane -

Kathleen McCreary of 10 Southwoods Lane appeared before the Board concerning the request of a group of citizens to place their creche at Boniface Circle. Her statement was as follows:

"I would like to explain what this second creche application is about. Seventeen individuals and myself applied to the Village Board to erect a privately owned creche, it is not to be confused with the creche that is owned by the Creche Committee on behalf of various religious congregations and churches in the area.

"We state in our application our purpose in applying to display our creche is to celebrate our own religious convictions

and to avail ourselves of our constitutional rights for freedom of religious expression.

The creche is small, discreet and tasteful. We would propose to erect a sign indicating that the ownership is entirely private. We also propose to put up a sign indicating that the Village of Scarsdale in no way endorses this, or any other religious views. We would furthermore propose to erect a sign saying that the creche is displayed because of the constitutional rights of the owners thereof to freely express their religious views."

Mrs. McCreary continued her statement by commenting on the legal aspects of the application stating her opinion as to why permission should be given — the Constitution guarantees religious freedom, and everyones rights must prevail.

Mrs. McCreary continued: "The Constitution does not guarantee the right of all or any segment of a community not to be offended by the content of religious communications and in considering our request that the Board not consider community approbation or disapprobation as a permissible standard for a decision if that is going to result in a curtailment of our basic freedoms.

"There are some groups who have opposed the creche and who will not agree with my position, that the Board must allow the display of a private creche. But they will not say, because indeed as a matter of law they cannot say, that a private creche on public property violates the physical separation of church and state. I reiterate that point. There is no party who would appear before this forum in opposition to the creche who can definitively and conclusively state that the Constitution prohibits the display of a privately owned creche on public property. And I would like to refer in this case to the briefs submitted by Trustee Underweiser on page 4 she states '...must the Village refuse to allow the creche to be displayed on Boniface Circle under the establishment clause of the first amendment' — and on her last page, the signature page, she states 'In this area of constitutional rights it is difficult to state the Village must act in a certain manner. Therefore I conclude that the Village may deny the Creche Committee request...'.

She stops far short despite strong attempts to conclude that there is a constitutional infirmity. I also refer to a brief submitted to you by Mr. Irving Sloane who states in his opening page 'As I suggest in this memorandum, a resolution based on policy will stand up more effectively than one based on law which would in effect being an attempt to second-guess the courts...'. One more quote from Mr. Sloane — '....the Supreme Court—on page 15— has never applied the establishment clause in the context of the public display of a religious symbol.' '...the board would be ill-advised to accept anyone's prediction about the results of a court challenge...'.

'Just one more point, with respect to your own Village Attorney, Mr. Holden, I am referring now to the brief that he submitted for your consideration in 1976. This is actually a memorandum of law in support of a motion for summary judgment. He was requested at that time to defend the Village in a law suit by Mr. Rubin. And in his brief, he states "the Board of Trustee also consulted the Village Attorney and own Law Committee as to the applicable law. After considerable research, they reported to the Board as follows: "Trustee Gordon stated that the Law Committee together with the Village Attorney had been requested to research the law in this matter. The decisions found do not prohibit the erection of a creche on public property provided it is not erected by a government agency. If the government agency does not put it up it does not violate the first amendment or the constitution of the State of New York'. This is your own Village Attorney opinion. This Village Attorney is still employed. I assume that you value his opinion now just as you did in 1976. I also have found no cases intervening between 1976 and the writing of this opinion.

My point to you is that I believe that since no one in this room can stand up and definitively say it is illegal for this Board to allow a creche, privately owned, to be erected on public property. And there are those of us who would ardently argue that indeed we have a basic constitutional right to have that creche erected. Therefore, it appears to me that the proper resolution of the issue is to resolve the doubt in favor of those

who wish to exercise their right of free religion. I leave to others in the room to argue the politics of the decision. But I think the law is very clear, and in deciding whether to allow our application I appeal to your intelligence, and I appeal to your fairness and most of all I appeal to your common sense."

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Mayor Stone stated that the Advisory Council on Human Relations stated that they would prefer to see the creche placed on private or church property. "No one of us have said at any time that we do not wish to see the creche erected in Scarsdale. We would prefer in this community, to see it placed on private or church property of which three sites were available this year."

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Trustee Ullman commented:"Although there was disagreement among the members of the Law Committee as to what the requirements of the Constitution are, I think we all agreed that it has at least not been established definitively that we are prohibited from permitting the creche. The action taken by the Board was not on the basis that we had to prohibit it. The action by the Board was taken for a variety of reasons. As you know it was divided four to three, but those who opposed it, some of them may have believed that it was prohibited. I don't know that it is true that any of them did. I think the majority acted on the basis that it was a more productive attempt to preserve good feeling in the community, to restrict this particular display to private property. As you know, I voted in favor of the creche. I think to be consistent with the position I took then, I would have again to vote in favor of the creche and I can say at the same time that I'm sorry that the issue is being brought up again because I think once it's been decided by the Village Board, it's only productive of further devisiveness to try to bring it up again. I think it's very unfortunate. The recommendation of the Advisory Council on Human Relations that we permit it was based primarily on their assumption that if we did permit it we would be sued, and the issue would be definitively decided from a legal point of view—so it would no longer be a political issue on the back of

the Village Board every year, and wouldn't affect the election of candidates to the Village Board. Personally, I don't believe that that kind of a suit would produce that kind of result. I think we are very likely to come out, and Trustee Glendon disagrees with me, with a court decision which would tell us that we do not have to prohibit this but on the other hand we do not have to permit it either, and we would be left right where we are, so it becomes a question of lets say the best human relations solution for the community. This is a matter obviously on which people can differ, and this Board did differ.

I would like also to comment on this constantly recurring question of the Christmas trees, the lights and other things, which seem to many people inconsistent. There are inconsistencies in the law, I don't know how the establishment clause can be squared with the issuance of creche postage stamps by the United States government. And the court and writers on constitutional law have recognized it, there are a lot of inconsistencies, and they're not all resolvable. But as far as Christmas trees are concerned, the Christmas tree was a pagan symbol before Christmas was ever heard of. The lights and the wreaths don't bother anybody. Nobody has any intention of questioning them, certainly this Village Board doesn't. And although I had more theoretical difficulty with the question of distinguishing Christmas carols on public property from the creche, nevertheless again, nobody has objected to it, I don't think this Village Board or any member of it actually have any intention of trying to restrict anything of that sort. I simply say that because the Law Committee didn't give any specific prohibitions or directions to the Board, every member voted his conscience on what they thought was best. I think we'll have to do that again.

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Trustee Glendon: "I think there is one thing we have overlooked in this thing. The constitution says that it and the laws passed by Congress pursuant thereto are the supreme law of the land. That means that it preempts laws of Congress that are unconstitutional, preempts State laws that are in conflict with it, preempts Village laws that are in conflict with it, it

preempts and overrules policies, no matter how well meant, of good neighborliness or keeping the season peaceful or any of the other reasons that I think may have motivated some of my fellow Trustees whose opinions I respect. The Constitution is the supreme law of the land, we as government officials have to obey the Constitution. Now, the Constitution says that we shall make no laws respecting the establishment of religion, or prohibiting the free exercise of religion. And it's my view that when government is faced with a question of either fostering a religion or prohibiting people from the free exercise thereof, we had better be very careful what we do and we better not be moved simply by desires for peace and tranquility. That's not important. Most of the great constitutional questions that have arisen, have arisen out of turmoil and furor and conflict and when people are moved. They hope that maybe this year we can lay this aside and it will be the end of this. I do not think they are reasoning constitutionally and they are not applying the supreme law of the land. Now, we all know about the separation of church and state and we are all for it—that's what we are all striving for. But the Constitution says, "the State may not establish, foster or prefer any particular religion." We all agree with that. At the same time, a compelling State purpose, the State, that's us, elected public officials, may do nothing to prohibit the free exercise of anyone's religion. Now there is a tension between those two causes. What we have to decide and what we have decided before, and I guess what we have to decide tonight, does the placing by a private organization of a creche on public property where the Village does nothing but permit it to be there, accompanied by whatever signs that may be erected to show the Village has nothing to do with it, does that foster or promote the establishment of a religion. Or to put it another way, if you deny that, do you have a compelling state reason for doing it. The only argument that possibly can be made is that it violates the establishment clause. And yet I don't think there is a single Trustee sitting in this room that will tell you that they have a deep abiding conviction that the presentation of the creche as it has been for

twenty-five years in this Village violates the establishment clause.

"I think this is the single most important decision this Board will make in its tenure. I think we've made it wrong on a recent vote, I am going to vote tonight. I am assuming that this offer is in good faith, that they have a creche, and that they will put up the signs that they say they will, and that it is in good taste. I am assuming all these things, and I am going to vote for constitutional reasons—and if this was a menorah or any other symbol of any other religion, I would vote the same way. I'm going to vote for the creche."

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Trustee Ullman stated "I am not aware of any decision of the court, not to say the Supreme Court, which goes so far as to say that the State must permit this kind of display on public property. Now, Trustee Glendon argues from other situations that this is something which must be permitted, he may be right. I think what we are saying here is that no case has gone so far as to hold that we must do what you say we must do. And this was essentially the disagreement we had on the Law Committee."

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Mrs. McCreary stated that she looks to the Board to protect her rights, not to force her to enforce them.

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Trustee Underweiser asked Mrs. McCreary: "As I understand it, you wish to put the creche on public property, Boniface Circle, you have not considered and will not consider the placement of the creche on church property." Mrs. McCreary said that was correct.

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Trustee Ullman asked Mrs. McCreary if the creche was new. She replied that it was jointly owned by the group of residents asking permission to place it at Boniface Circle.

Trustee Ullman stated that the Board of Trustees was not sitting as a court of law and they didn't have to vote according to legal principles which have not been 100% definitively established. It was not for the Board to decide this question.

Mayor Stone stated that the majority of Board members were not lawyers, and did not pretend to be a court of law. They are a legislative body and it is in this capacity that they will act. If people disagree with the Board's decision then it is within their right to take the Village to court and have a legal decision made.

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The Deputy Village Clerk presented the following written communications:

Mayor Stone received a letter from County Executive Alfred DelBello thanking her for sending a copy of the Board's resolution of support for the four lane safety improvement plan for the Hutchinson River Parkway.

Mr. DelBello said he was in favor of the compromise 6-4-6 proposal and that he had considered the matter carefully and had the best interests of Westchester's residents in mind.

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Letters were also received from the following persons concerning the placement of the creche at Boniface Circle:

James Matts, County Commander of the Westchester County American Legion;

Marvin Hall, 195 Johnson Road

Marge D'Arcy, 7 Barry Road

* * * * * *

The Board of Trustees received a letter from 17 residents, with Cathleen McCreary as coordinator, requesting permission to erect a privately owned creche at Boniface Circle between December 18th and December 26th.

Upon motion duly made by Trustee Glendon and seconded by Trustee Bowen, the following resolution was offered and denied by the vote indicated:

Trustee Bowen made the following statement before the vote was taken. "There was an impression left in one of the statements from the audience that there was consideration of political reaction to the action of this Board on this particular issue. I personally want to say that I would be very sorry if this community reacted to the concept of the non-partisan system by choosing sides on this one particular issue. At a meeting last

Sunday, where each Trustee and the Mayor were asked to comment on their roles and responsibilities that they brought to the Village Board, I think underlying a number of statements, was the fact that we are here on this Board to serve the interest of the entire community, in a manner that we best as individuals see each individual issue as it's brought before this Board. In my opinion, it doesn't matter whether it's the creche issue, which is an explosive subject, whether it is the Polera project, Walworth Avenue, or other traffic problems. We are still faced with the responsibility as individuals—to assess what is best for the entire community and to vote independently on that matter. Contrary to the impression left by Mrs. Dohrenwend, nobody on this Board, to the best of my knowledge, knew how the vote was going to turn out when we met here on the initial discussion of the creche issue. We do not meet in private and decide how we are going to vote. We conduct all our meetings and discussions in public and vote in public. Nobody on the Board knew, some of us may have had ideas, because we do talk individually amongst each other, but nobody knew how the vote was going to turn out. I would hope, no matter what the outcome is tonight, the people in this community respect the integrity and the deep soul searching that each and every member of this Board brings to their decision on how to vote. I think you do us a disservice and certainly the community a disservice to suggest otherwise.''

* * * * * *

RESOLVED: that the Board of Trustees hereby gives permission for a creche to be placed at Boniface Circle for the holiday season.

AYES	NAYS	ABSENT
Trustee Bowen	Trustee Brown	None
Trustee Glendon	Trustee Falkenberg	
Trustee Ullman	Trustee Underweiser	
	Mayor Stone	

* * * * * *

Trustee Glendon stated: ''Madam Mayor, I would like to commend you on the fairness and openness with which you have handled this very difficult issue. As is apparent you and I disagree on the merits, I just want to say publicly, that at no time have I felt that you did anything but seek to promote open, fair and honest discussion on this very difficult issue and I commend you for your handling of the matter.''

* * * * * *

Mayor Stone presented the following statement recognizing the service of G. Frederick Griffiths: ''Tonight, I would like to take special recognition of an outstanding example of volunteer service for our Village and on behalf of this Board congratulate Mr. G. Frederick Griffiths on his fifty years of service as a volunteer fireman, 40 of which have been with the Scarsdale Volunteer Fire Company #3. Mr. Griffiths who moved to Scarsdale in 1921 told Mrs. Sieck in the Manager's Office, that he recalls when they would hook up horses to the fire engines—he remembers when the Harwood building was being built and when the Bronx River Parkway was not there.

''I understand he has recently been awarded his ''White Hat''—and we all know it the good guys who wear those. Mr. Griffiths who still attends meetings of company #3 regularly, wants me to be sure to point out that his company as well as the other companies have many young men involved. We think he serves as an excellent example to them and us of volunteer service.''

* * * * * *

Mayor Stone also reported: ''The family of Peggy Berendt, who passed away this summer, has expressed an interest in establishing a Peggy Berendt Memorial Fund. Mrs. Berendt was a longtime resident, active in community affairs and an employee of the Village in the Police Department. This fund would be set up under the auspices of the Village with its resources to be used for the betterment of the community. The fund would receive charitable contributions from friends and relatives as a way of expressing tribute to her life and good

works. This proposal has been reviewed and approved by the Village Attorney.

"If it is the consensus of the Board we can tonight direct the Village Treasurer to establish the fund. Then, the Finance Committee in cooporation with the Law Committee and the Village Treasurer can consult with the Berendt family as to the uses of any contributions."

Upon motion duly made by Trustee Brown and seconded by Trustee Ullman, the following resolution was adopted unanimously:

RESOLVED: that the Village Treasurer is hereby directed to establish a Peggy Berendt Memorial Fund.

* * * * * *

COPY
TYPED FOR PURPOSE OF LEGIBILITY

TO: BOARD OF TRUSTEES OF SCARSDALE VILLAGE
FROM: THE UNDERSIGNED
RE: PERMISSION TO ERECT A CRECHE AT BONIFACE CIRCLE

The undersigned hereby respectfully request permission to erect a "Creche" (i.e. the Nativity Scene) on Boniface Circle between December 19, 1982 and December 26, 1982. This Creche is the private personal property of the undersigned and should not be confused with the Creche owned by the Creche Committee on behalf of various Scarsdale Churches and Congregations.

All expenses and costs of the erection and dismemberment will be borne by the applicants, as well as any direct or indirect maintenance costs of the Boniface Circle premises.

Our purpose in requesting to display the Creche is to celebrate our personal religious convictions and avail ourselves of our constitutional right of freedom of religious expression.

Dated: Scarsdale, N.Y.
December 7, 1982

Respectfully submitted,

10 Southwoods Lane	Kathleen S. McCreary —Coordinator
10 Southwoods Lane	Robert N. McCreary
44 Tunstall Road	Edward Napolitano
3 Hamilton Road	Richard Cardito
224 Nelson Road	Art Messenger
224 Nelson Road	Angelina Messenger
179 Johnson Road	John P. Hegarty
179 Johnson Road	Carol A. Hegarty
177 Johnson Road	Nancy Amarillo
177 Johnson Road	Anthony Amorillo
6 Barry Road	C. Hoey
5 Tunstall Road	Eileen Brennan
5 Tunstall Road	D. Brennan

10 Tunstall Road	Loretta G. DiLorenzo
10 Tunstall Road	Robert DiLorenzo
24 Hamilton Road	Patricia Redican
24 Hamilton Road	Richard Redican

VILLAGE MANAGER

TO: BOARD OF TRUSTEES OF SCARSDALE VILLAGE
FROM: THE UNDERSIGNED
RE: PERMISSION TO ERECT A CRECHE AT BONIFACE CIRCLE

The undersigned respectfully request permission to erect a "Creche" (*i.e.*, the Nativity Scene) on Boniface Circle between December 17, 1983 and December 26, 1983. This Creche is small and tasteful and is similar to a display which has been placed on Boniface Circle for many years during the Christmas season. This Creche is private personal property and should not be confused with the similar Creche owned by the Scarsdale Creche Committee on behalf of various Scarsdale Churches and Congregations.

All expenses and costs of the erection and removal of the display will be borne by the applicants, as well as any direct or indirect maintenance costs incurred on the Boniface Circle premises. A notation will be placed on the display indicating that it is made by private citizens and that the Village of Scarsdale does not support or sponsor the display.

Among the several purposes of the undersigned in making this request are desires to join in the Village's celebration of Christmas by giving recognition to the birth of Jesus Christ the occasion and namesake of the holiday, to communicate the Christmas message of peace and goodwill to the Scarsdale community, to celebrate and express religious convictions, and to evoke a spirit of religious toleration and freedom of expression which is fundamental to the well being of our

Village and our nation, all ofwhich purposes are grounded in the undersigned's civil and Constitutional rights of free speech and religious expression.

Dated: Scarsdale,N.Y.
February 3, 1983

Respectfully submitted

_____	_____
_____	_____
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEONARD H. RUBIN,

Plaintiff,

—against—

VILLAGE OF SCARSDALE and
SCARSDALE CRECHE COMMITTEE,

Defendants.

ANSWER
76 Civ. 5557 (R.J.W.)

Defendant, the Village of Scarsdale, for its answer to the amended complaint respectfully alleges and shows this court:

1. Denies each and every allegation contained in paragraphs 4, 9 and 10.

FOR A FIRST SEPARATE AND COMPLETE DEFENSE

2. The plaintiff has not been deprived of any rights protected by the United States Constitution.

FOR A SECOND SEPARATE AND COMPLETE DEFENSE

3. The amended complaint fails to state a cause of action.

FOR A THIRD SEPARATE AND COMPLETE DEFENSE

4. That the Village of Scarsdale granted permission to the Scarsdale Creche Committee to use Village property in the same manner a permission is customarily granted by the Village to any other local organization. Except that the Village required the Committee to erect and maintain a sign stating that the Nativity scene was erected and maintained by the Scarsdale Creche Committee, a private organization.

FOR A FOURTH SEPARATE AND COMPLETE DEFENSE

5. That neither the intentions nor motives of the defendant Scarsdale Creche Committee, whether expresses or implied, may be imputed to nor attributed to the defendant Village.

WHEREFORE, the defendant, Village of Scarsdale, demands judgment dismissing the complaint and granting it costs and disbursements of this action.

JOHN F. HOLDEN, JR.
Attorney for the Village of Scarsdale
Village Hall
1001 Post Road
Scarsdale, New York 10583
(914) 723-3300

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEONARD H. RUBIN,

Plaintiff,

—against—

VILLAGE OF SCARSDALE and
SCARSDALE CRECHE COMMITTEE,

Defendants.

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76 Civ. 5557 (RJW)
AFFIDAVIT IN SUPPORT
OF DEFENDANT VILLAGE
OF SCARSDALE'S MOTION
FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
: ss.:
COUNTY OF WESTCHESTER)

JOHN F. HOLDEN, JR., being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice before the United States District Court for the Southern District of New York, and am the Village Attorney for the Village of Scarsdale (hereinafter referred to as "Village"), one of the defendants herein.

2. I am fully familiar with all of the facts and circumstances relating to the subject action, and the events which preceded its commencement.

3. On November 23, 1976, the Board of Trustees of the Village of Scarsdale considered a written request dated November 10, 1976, from the Scarsdale Creche Committee (hereinafter referred to as "Creche Committee") asking permission to use a plot of village-owned land in the business

center of the Village, said plot known as Boniface Circle, for the Committee to erect and maintain a Nativity Scene during the 1976 Christmas season. A copy of this request is annexed hereto as exhibit A.

4. Similar requests, I am informed by members of the Village staff, have been received and routinely granted since 1957.

5. At an earlier meeting of the Board of Trustees, plaintiff appeared in person and indicated that, if such a request were made in 1976, he would appear before the Board in opposition to the request.

6. At the request—of the Board of Trustees, the issue of whether permission should be granted to erect a creche on said plot had been referred to the Human Relations Advisory Committee of the Village early in November. The Committee, which is comprised of citizens of different faiths, submitted its written report recommending approval on November 22, 1976. A copy of this report is annexed hereto as Exhibit B.

7. The Board of Trustees also sought the opinion of the Village Attorney and the Law Committee of the Board on the legality of permitting the erection of a creche by a private group on public property.

8. At the Board of Trustees Meeting held November 23, 1976, Trustee Frank H. Gordon, Chairman of the Law Committee, reported to the Board the opinion of the Law Committee and the Village Attorney that, under the decisions, it would be legally proper to grant the Creche Committee's request. No one present at said meeting, including plaintiff, disputed the correctness of said report. Indeed, plaintiff agreed with the legal conclusion. This oral report is summarized briefly in the Board Minutes at page 314, and is annexed hereto as Exhibit C.

9. At the same meeting, and after hearing various citizens, including plaintiff, on the issue of whether to grant the Creche Committee's request, the Board of Trustees duly adopted a resolution granting said Committee's request, and simultaneously imposing certain conditions on the proposed use of Village property. An extract from the Board Minutes setting

forth this resolution in full is annexed hereto as Exhibit D. It is the next page in the Minutes and should be read with Exhibit C.

10. The creche, owned by the Creche Committee, was erected by the Creche Committee at its sole cost and expense on or about December 15, 1976, and maintained by it at Committee expense.

11. A member of the Village Police Department, acting at the direction of the Village Manager, inspected and photographed the scene to insure compliance with the conditions contained in the resolution.

12. The Creche Committee also erected and maintained at its own cost and expense a sign beside the creche, stating, "Creche erected, maintained by Scarsdale Creche Committee, a private organization." Said sign was maintained at the creche throughout the entire time the creche was in place. Photographs of the creche and the sign are annexed hereto as Exhibit E.

13. The creche and sign remained on the Village property (Boniface Circle) until its removal by the Creche Committee on January 3, 1977.

14. At all times relevant to this action, the Board of Trustees and the officials of the Village of Scarsdale have demonstrated a scrupulous regard for the applicable case and statute law, both Federal and State, and acted in conformity therewith so as neither to promote nor establish a particular religion nor abridge the freedom of exercise of any religion.

15. Defendant Village and its officials acted in regard to the Creche Committee's request in a manner no different than it would if presented with a similar request from a similar organization.

WHEREFORE, I respectfully request that the motion for summary judgment by the Village of Scarsdale be granted in

all respects and the amended complaint be dismissed in its entirety with prejudice.

John F. Holden, Jr.

Sworn to before me this
16th day of June, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEONARD H. RUBIN,

Plaintiff,

—against—

VILLAGE OF SCARSDALE and
SCARSDALE CRECHE COMMITTEE,

Defendants.

---

76 Civil No. 5557 (RJW)

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY VILLAGE OF SCARSDALE

FACTS

On November 23, 1976, the Board of Trustees of the Village of Scarsdale, a Municipal Corporation located in the County of Westchester, State of New York, considered a letter dated November 10, 1976, from the Scarsdale Creche Committee, an organization representing seven churches in the Scarsdale area of varying denominations. (Holden Aff., ¶3 and Ex. A)

The letter requested permission from the Board of Trustees to erect and maintain a Nativity Scene in Boniface Circle, a small plot of village-owned land located in the business center of the Village, during the 1976 Christmas season. Similar requests had been made to and granted by the Board of Trustees since 1957. (Holden Aff., ¶4)

The Board of Trustees, at an earlier meeting, had been notified by the plaintiff that he was aware of this tradition in the Village of Scarsdale and would, when the request was formally presented to the Board of Trustees, appear and oppose the granting of permission. (Holden Aff., ¶5) Aware of

plaintiff's position and desirous of maintaining the outstanding record which the Village of Scarsdale has attained in human relations, the Board of Trustees requested the Human Relations Advisory Committee of the Village of Scarsdale to make a recommendation in the event that the customary request was again received in 1976. (Holden Aff., ¶6) The Committee, comprised of citizens of all faiths, met, studied the question, and submitted a written recommendation dated November 22, 1976, which concluded:

> "The Scarsdale Human Relations Advisory Committee recommends to the Village Board that the Board accept the request of the Scarsdale Creche Committee to erect its Nativity Scene at Boniface Circle in the Village of Scarsdale during the coming Christmas season." (See Holden Aff., Ex. B)
>
> The Board of Trustees also consulted the Village Attorney and its own Law Committee as to the applicable law. (Holden Aff., ¶7) After considerable research, they reported to the Board, as appears in the Minutes, as follows:
>
> "Trustee Gordon stated that the Law Committee, together with the Village Attorney, had been requested to research the law in this matter. The decisions found do not prohibit the erection of a Creche on public property provided it is not erected by the government agency. If the government agency does not put it up, it does not violate the First Amendment or the Constitution of the State of New York. In the District of Columbia when they considered the matter, the Judge thought it would be useful if there was some sign to indicate that the Creche was erected by a private group and not a public authority. This would be a useful addition to the resolution granting permission to the Scarsdale Creche Committee." (See Holden Aff., Ex. C)

After hearing various citizens on the question, the Board, at the same meeting, on a motion duly made and seconded, adopted the following resolution:

"RESOLVED: that for the year 1976, permission is hereby granted to the Scarsdale Creche Committee to place a Nativity Scene in Boniface Circle during the Christmas season, and be it

"FURTHER RESOLVED: that an appropriate sign be affixed to said Nativity Scene stating that it is erected and maintained by the Scarsdale Creche Committee, a private organization." (See Holden Aff., Ex. D)

The Creche, which is owned by the Scarsdale Creche Committee, was erected on December 15, 1976, and thereafter maintained, by the Committee at its sole cost and expense. (Holden Aff., ¶10) It remained on Village property until it was removed by the Creche Committee on January 3, 1977. (Holden Aff., ¶13) The Committee also erected at its sole cost and expense, and maintained during the entire time the creche was in place, a sign stating, "Creche erected, maintained by Scarsdale Creche Committee, a private organization." (Holden Aff., ¶12, and Ex. E)

The instant suit was commenced by filing in this court on or about December 15, 1976. The answer of the Village was served and filed on January 4, 1977. Plaintiff asks for a declaratory judgment and an injunction against similar use of Village property in the future.

ARGUMENT

POINT 1

THE DEFENDANT, VILLAGE OF SCARSDALE, HAS NOT DEPRIVED THE PLAINTIFF OF ANY RIGHT PROTECTED BY THE CONSTITUTION OF THE UNITED STATES, NOR ANY STATUTE OF THE UNITED STATES.

In his amended complaint, the plaintiff states that rights guaranteed to him by the First and Fourteenth Amendments to

the Constitution of the United States have been abridged and that this court has jurisdiction pursuant to 42 U.S.C. 1983, 28 U.S.C. 1343 (3) and (4), and 28 U.S.C. 1331 (a).

A careful examination of the undisputed facts indicates that neither have these constitutional amendments been violated nor have these statutes any application here.

Assuming, for the sake of argument, that granting permission to a group of residents to use Village of Scarsdale (hereinafter referred to as "Village") land constitutes state action, as that term is used in construing the First and Fourteenth Amendments, the Village has still not committed a proscribed act. It has neither established a religion nor prohibited the free exercise of religion. It has not favored one religious group over another, nor even become excessively entangled in religious matters to a prohibited degree. *Allen* v. *Morton*, 495 F.2d 65 (D.C.Cir. 1973).

Section 1983 of 42 U.S.C. creates a civil cause of action in favor of a person who has been deprived of rights secured by the United States Constitution and Federal Laws. Subdivisions three and four of 28 U.S.C. §1343 give jurisdiction to the Federal Courts over such an action. They read in pertinent part as follows:

> "The district courts shall have original jurisdiction of any civil action *authorized by law* to be commenced by any person:
>
> * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." (Emphasis added)

Section 1331, of 28 U.S.C., entitled: "Federal Question; Amount in Controversy; Costs," reads in pertinent part as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, *and* arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." (Emphasis added)

These statutes indicate that when a Federal question is involved and a right secured by the U.S. Constitution or a Federal statute is being denied by any State or under color of State law, the aggrieved person may come into a United States District Court and seek relief in a civil action. These statutes do not create new rights, but merely provide a means of protecting existing constitutional and federal statutory rights if they are violated.

Plaintiff alleges violations by the Village of rights guaranteed to him by the First and Fourteenth Amendments and seeks redress through the aforementioned statutes.

The Fourteenth Amendment makes applicable to the several States the "protections" afforded by, among others, the First Amendment. Plaintiff, in conclusory fashion, alleges that "permitting the creche to be erected and maintained during Christmas periods is, has been and will be, if continued, an unconstitutional establishment of religion prohibited by the First and Fourteenth Amendments." (Amend. complaint, §9) He overlooks the chasm between "permitting" citizens to use public land in a traditional holiday fashion and "establishing" a state religion in the tradition of Henry VIII.

The Village has done nothing to the plaintiff here, or anyone else, by way of establishing a religion which must be joined or supported, nor conversely has it prevented anyone from exercising his own religious beliefs or lack of them. Plaintiff is,

therefore, not properly before this court under any theory of law advanced by him.

POINT II

THE COURT MAY PROPERLY GRANT SUMMARY JUDGMENT SINCE THERE IS NO FACT ISSUE BEFORE IT.

All of the actions of the Board of Trustees of the Village of Scarsdale are a matter of public record. There was a written request from a group of residents to use public property without any cost and expense being incurred by the Village. Prior to granting that request, the Village Board, being sensitive to public opinion and having great respect for the religious beliefs of its diverse population, requested and received a written report from its Human Relations Advisory Committee.

Since the question of the legality of its proposed action had been raised in open public meeting, the Board of Trustees consulted the Village Attorney and its Law Committee. After extensive research, the Trustee Chairman of the Law Committee reported at a public meeting that decisions indicated that erection of a creche on public property by a private group is not violative of First Amendment or State constitutional rights. It should be added parenthetically that no one, including the plaintiff who was present at that meeting, disputed the correctness of the report or legal advice given to the Board.

After the Board of Trustees granted permission to the Creche Committee to erect the creche, that Committee did, at its own cost and expense, erect and maintain the Nativity Scene with the sign stating, "Creche erected, maintained by Scarsdale Creche Committee, a private organization," which sign remained present as long as the Nativity Scene was displayed. The Nativity Scene was subsequently removed by its owner, the Creche Committee, again at its expense.

The plaintiff has attempted to ascribe certain motives to the defendants in this action. The defendant, Village of Scarsdale, has in a fourth separate and complete defense in its answer stated: "that neither the intentions nor motives of the defend-

ant, Scarsdale Creche Committee, whether expressed or implied may be imputed to nor attributed to the defendant, Village." This is still our position. It has permitted erection of a creche on Village property since 1957. The Board of Trustees permitted a group of residents to use Village property in the same manner as it would permit any other similar group seeking such permission. The Village had nothing to hide and has hidden nothing. There is no question of fact before the Court—no material allegation of fact in the Amended Complaint is controverted by the Village. The Court is free to determine this action as a matter of law and grant summary judgment for the Village.

POINT III

THE ACTION TAKEN BY THE VILLAGE OF SCARSDALE WAS LAWFUL.

No one, including the plaintiff during his numerous appearances before the Board of Trustees, has been able to point to a single authority, State or Federal, which would prohibit what the Village has done.

Similar fact situations were before the Supreme Court of the State of New York, County of Westchester, on two occasions. In *Baer* v. *Kolmorgen*, 131 N.Y.S. 2d 230, 14 Misc.2d 1015 (Sup.Ct. Westchester 1958), a school district permitted a group to use its property for the erection of a creche at the group's sole cost and expense during a time when school was not in session. Proof was taken and the court found that, similar to the facts in this case, there had been a long tradition of granting requests to various groups to erect signs or symbols on the school lawn. The court further found that no similar privilege had been requested by any other religious group nor been denied by the school board. The court stated:

> "the Creche is undoubtedly a religious symbol. In viewing it, however, we are all free to interpret its meaning according to our own religious faith. If any public body were to limit that freedom, or if any public institution

> were to give instruction as to its meaning there would, unquestionably be a constitutional violation. That, however, is not this case. Here the school board has done no more than make a small portion of its property available for the display. To that extent, they have accommodated a religious though non-denominational group. However, the accommodation of religious groups is not per se unconstitutional." 181 N.Y.S.2d at 238.

The court then dismissed the complaint which sought a permanent injunction against the erection of the Creche.

The second case which also arose in Westchester County was *Lawrence* v. *Buchmueller*, 243 N.Y.S.2d 87, 40 Misc.2d 300 (Sup.Ct. Westchester 1963). Certain parents, whose children attended public school, brought a declaratory judgment action against the school district, alleging that the district had no legal or constitutional authority to permit a Christmas Nativity Scene to be erected on its property.

In denying the plaintiff's motion for summary judgment, the court stated in relevant part:

> "It is the judgment of this court that the resolution of the Hartsdale School Board permitting the erection of a Creche under the circumstances here present, does not constitute the establishment of religion." 243 N.Y.S.2d at 90.

The circumstances referred to by the court were that school was not in session while the creche was in place, and that there was no involvement of school personnel nor use of public money. Similarly, no public officials or public money was involved in the erection and maintenance of the Creche in this case.

The leading Federal case dealing directly with the question of the erection of a Nativity Scene on public lands is *Allen* v. *Morton*, 495 F.2d 65 (D.C.Cir. 1973). Plaintiff-appellants appealed a judgment after trial for defendant-appellees in the district court from the case of *Allen* v. *Morton*, 333 F.Supp. 1088 (D. D.C. 1971). The record facts on appeal included

partial sponsorship by an agency of the United States Government (*i.e.*, the National Park Service) and government officials' participation in planning and organization committees of the Christmas Pageant of Peace.

The Court of Appeals held, essentially because of the participation on committees, that the government itself was excessively entangled with religion and thus reversed the district court's judgment. The Court enjoined the government's participation in the Christmas Pageant of Peace which, among other things, erected and maintained the Nativity Scene. The Court made it clear, however, that the mere use of Federal land for the erection and maintenance of a Creche without the use of Government funds or personnel was *not* prohibited by the Constitution of the United States or any Federal statute. See both Tann, J. and Leventhal, J. opinions. The Court stated that if government land were so used and "the Government decides to terminate all sponsorship or connection with the Pageant, appropriate placques should be ordered by the District Court, as set forth in Judge Leventhal's opinion." 495 F.2d at 67. In his opinion, Judge Leventhal stated that "[t]hese placques should be designed for maximum exposure and readability to the sole purpose of stating that the government in no way sponsors the Pageant of Peace event." 495 F.2d at 90-91.

Similarly, in the present case, the Board of Trustees of the Village passed a resolution requiring the Creche Committee to affix a sign "to said Nativity Scene stating that it is erected and maintained by the Scarsdale Creche Committee, a private organization" and such a sign was affixed by the Committee. (See Holden Aff., Exs. D and E). The effect of such a sign surely indicates that the Village of Scarsdale was neither sponsoring the Creche, promoting a religious view nor profaning the symbols of any religion.

In simple terms, this creche in Boniface Circle in Scarsdale was a part of a traditional celebration of the Christmas season. Village offices are closed on Christmas Day, an illuminated star is erected on Bellevue Hospital, the U.S. Postal Service issues a stamp depicting a Nativity Scene. Christmas trees are erected and decorated in public buildings everywhere, including the White House. None of these is the establishment of religion so abhorred by the Founding Fathers. In short, plaintiff has not pleaded and cannot prove any deprivation of a Constitutional or a statutory right.[1]

CONCLUSION

The motion for summary judgment in favor of the Village of Scarsdale should be granted in all respects, and plaintiff's amended complaint should be dismissed in its entirety.

Respectfully submitted,

JOHN F. HOLDEN, JR.
Village Attorney
Scarsdale Village Hall
1001 Post Road
Scarsdale, N.Y. 10583
(914) 723-3300

Attorney for Defendent
Village of Scarsdale

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1 Significantly, the Court of Appeals, per Leventhal, had stated in a prior appeal in the same case, Allen V. Hickel, 424 F.2d 944, 948 (D.C. Cir. 1970) that "the Government may depict objects with spiritual content, but may not promote or give its stamp of approval to such spiritual content."

VILLAGE OF SCARSDALE
Village Hall
Scarsdale, New York 10583
(914) 723-3300

Lowell J. Tooley
Village Manager
November 1, 1976

Mrs. John Kirk
16 Barry Road
Scarsdale, New York

Dear Ellie:

Further to my telephone call of October 25, the enclosed correspondence will give you a glimpse of past action and concern on the matter of the location of the Creche at Boniface Circle.

While it is somewhat difficult to refer a non-item to the Committee on Human Relations, it is presently the opinion of various members of the Board of Trustees that the location of the Creche in Boniface Circle this year is a subject that could well be explored by your Committee. Two people who have been especially concerned on this subject are Father Sandberg of IHM and Reverend Mr. Merlin Meyer of Trinity Lutheran.

While the Scarsdale Clergy Committee discussed this at its most recent meeting, it is presently expecting to consider position papers by various members of the clergy at a later meeting, perhaps in about a week and a half or two weeks. In addition, Trustee George Szabad, who is an attorney, may be helpful from the standpoint of court decisions on this subject.

Since this is undoubtedly not a legal question, what the Village Board would find helpful is your appraisal of how the population of Scarsdale feels about using Boniface Circle for locating the Creche.

Yours very truly,

Lowell J. Tooley
Village Manager

LJT:JFS
Enclosures (6)
cc: Board of Trustees

16 BARRY ROAD
Scarsdale, New York 10583

November 22, 1976

Honorable Boine T. Johnson
Mayor, Village of Scarsdale
18 Fairview Road
Scarsdale, New York 10583

Dear Boine:

The Human Relations Advisory Committee met on Thursday evening, November 18 at Village Hall to discuss and formulate a recommendation about placing the Creche at Boniface Circle. The recommendation and reasons for this are included in the enclosed attachment. If you have any questions about this or need further information, please let me know.

Some members of the Advisory Committee will be attending the Village Board meeting on Tuesday, November 23 in case any additional support is needed.

Sincerely,

Eleanor H. Kirk
Chairman, Human Relations
Advisory Committee

November 22, 1976

TO: Honorable Boine T. Johnson
and Members of the Village Board

FROM: Human Relations Advisory Committee
Eleanor H. Kirk, Chairman

The Human Relations Advisory Committee met on Thursday evening, November 18, with six of the seven members in attendance, to consider the question of locating the Creche at Boniface Circle and to appraise how the people of Scarsdale feel about this. This review by the Committee was requested by the Village Board of Trustees and transmitted to the Committee in a letter of November 1 by Lowell Tooley, Village Manager.

BACKGROUND INFORMATION:

In considering this matter, the Committee reviewed pertinent correspondence of 1974 and 1975 which had been given to the Committee by the Village Manager. In addition, the November 10, 1976 request of the Creche Committee to the Village Board was made available to the members as well as other related correspondence. In advance of the meeting, each member of the Advisory Committee had discussed the matter informally with a large number of persons in the Village. This represented a broad survey of religious, ethnic and other groups and individuals to ascertain current feelings on the matter. Other material available to the Committee included memoranda and reports as well as newspaper articles from other communities in Westchester and elsewhere where there had been public policy review concerning the location of a Creche during the holiday season. All of this provided extensive background information for the Committee and helped it in making its recommendation to the Village Board. The Committee is making its recommendation with the assumption, based on the information available to us, that there are not now or will not be any illegalities involved.

RECOMMENDATION:

The Scarsdale Human Relations Advisory Committee recommends to the Village Board that the Board accept the request of the Scarsdale Creche Committee to erect its Nativity Scene at Boniface Circle in the Village of Scarsdale during the coming Christmas season.

As a result of the discussions held by each member of the Advisory Committee with fellow residents, the Committee feels that, since the Creche has been located at Boniface Circle for so many years during each Christmas season, its presence there is accepted by a majority in the Scarsdale community, regardless of religious beliefs, as a long-held tradition of the Village. The Committee is aware that some of the residents, including some of the clergy, believe the Creche should be located on other than public property. However, the Committee believes that even among those who would rather not have the Creche located on public property, all or most want to support a decision which will have the most harmonious effect on relationships within the community. The Advisory Committee believes that, since this request by the Creche Committee is not a new one and is based on an accepted custom followed over many years, its tradition supports the strong sense of community in our Village.

The Advisory Committee further believes that in recommending that this tradition be maintained at this time, it is supporting and affirming the high standards of human relationships which have always existed among all groups and individuals in Scarsdale.

Members of the Human Relations Advisory Committee
June Branche
Lynn Clark
Richard Gerloff
Rowland Miller
Harry Sternberg
Peter Strauss
Eleanor Kirk—Chairman

March 21, 1978

Report of the Advisory Council on Human Relations 1977-78

To The Scarsdale Village Board of Trustees:

This report covers the 1977-78 activity year of the Advisory Council On Human Relations.

The Council dealt with two primary concerns during this period: one, the *Boniface Circle Creche*, was largely passive; and the other, The *Community Residence for the Retarded* is current and quite active.

Since the Creche question was in the hands of the Court for most of 1977, there was little that had to be or could be done. However, several informal approaches were made to representatives of the Clergy Club to determine whether this body had reached any compromise from which the Church property rotation idea could be developed further. It was clear that there still was no [missing copy] agreement within the Clergy Club prior to the 1977 Christmas Season.

Clearly, everyone was waiting for The Court to act one way or the other. The Council Chairman requested the Village to approach The Court in early Fall to suggest that a prompt decision would improve chances for dealing with any community reaction to its decision—one way or the other. The Court did not respond and issued its decision—a non-decision—virtually concurrently with the Creche Committee's annual request in November. Fortunately, those opposed to the Creche's location did not make a major issue of it at that time, so that the Council's active involvement was not called for.

At its meeting on November 3, 1977 the Council agreed that if the Village Board were to ask it for a recommendation again, absent any Court decision to the contrary it would reiterate the recommendation made in 1976. The Council, as then constituted, felt that so long as no generally satisfactory alternative was possible, barring the Creche from Boniface Circle after so many years would be destructive to the best human relations interests within the community.

The Council remains available to the Board concerning this issue should future events require its services.

The Community Residence for the Retarded is a matter currently involving the Council at the request of the Board. The Council's Chairman was called to a briefing session conducted by the Westchester County Transitional Committee at the home of Trustee Richman on Oct. 6. The Council met Nov. 3 for a full scale educational briefing and discussion conducted by County, State, and WARC officials. On Dec. 12, the Council visited a Yonkers Community Residence for a tour and discussion with that home's Community Advisory Board. Individual members of the [missing text] shop in White Plains to round out the initial educational phase for Council members.

The next Council meeting was held in conjunction with Presidents of all major Village organizations at a session called by Trustee Jensen for Feb. 6 at Village Hall. Another presentation by County, State and WARC officials was made at this meeting, followed by a lengthy question session and a decision as to how we should proceed to achieve a community-wide general education on the subject.

It was decided to conduct a minimum of five neighborhood meetings and to ask a few major organizations to include the subject on their program agendas.

As of this date, one meeting, The Village Club's program, has been held (March 20) and six other meetings have been scheduled, and one other is a possibility.

The PT Council and SNAP Boards agreed to have the elementary school PTA's and a combination of neighborhood associations coordinate their forces for five neighborhood meetings.

It was agreed that all meetings should be concluded before the end of April since the site selection process had already begun.

This effort by Scarsdale to pave the way for a Court mandated [missing text] is a first within the State. It has had major organizational difficulties. On the one hand, Council members were trying to educate themselves about the program

at the same time it was the Council's responsibility to set up educational meetings within the community. On the other hand, the "educators" and resource people from the County, State and WARC were largely unprepared to deal with the unusual request from Scarsdale to educate the community before the fact.

The coordination of work by the Transitional Committee and the Council was also a problem since the former had been involved and had momentum long before the Council became involved. Thanks to the efforts of Trustee Jensen, this coordination now exists.

The major problem in the educational area remains one of producing positive, dynamic, and effective meetings. The Village Club program became the test case. It was given every chance of success by a superb organizational job by the Club program chairman who is also a member of the Council, Lynne Clark. The presentation did reveal some major weaknesses and improvement efforts are under way in an attempt to make subsequent meetings more effective.

Meeting Schedule (subject to change):

Quaker Ridge	April 4
Heathcote	April 5
Town Club	April 6
Greenacres	April 11
Fox Meadow	April 13
Edgewood	April 26

In addition to the general meetings, the Council recognizes that it may have to deal with controversies stimulated by the meetings. As the program becomes better known it will tend to shake out more opposition. In particular, when a site is selected the Council will have to be sensitive to the concerns and problems raised in that immediate area—without at the same time overlooking the possible implications of this project on the larger community.

* * * * * *

As this report is being submitted the Board has announced that two of our Council members have completed their service—Eleanor Kirk and June Branche. Both have given generously of their time and their wisdom to the Council and deserve the praise of the Board and the community. Ele also served the Council as its Chairman during an important transitional period in its relationship to the Board, was skillful in her leadership and in securing Board action on certain human relations problems before they produced major confrontations.

June's dedication and responsible work are well known to [copy omission] she also has been in the forefront in preventing major confrontations [copy omission] educate Village officials about existing human relations problem.

Finally, the Council has been deprived of another of its members, Chuck Sims, after a brief but productive term. Chuck's attentive interest and involvement in the early education sessions on the Community Residence project produced valuable insights for all Council members. Fortunately, he leaves the Council for the only acceptable reason—his election to The Board of Trustees where he as well as the entire Board can continue to rely on the Council for service where and when necessary.

Respectfully submitted,

Peter Strauss,
Chairman

TO: HONORABLE GRADY E. JENSEN AND THE BOARD OF TRUSTEES

FROM: THE ADVISORY COUNCIL ON HUMAN RELATIONS

SUBJECT: THE CRECHE AT BONIFACE CIRCLE

Due to increased and diverse comments over the approval of the Creche's placement in Boniface Circle during the 1979 Christmas season, the Council was asked by the Board of Trustees to look thoroughly into the Creche situation and to report to the Board when the request came in 1980. This is a report of the Council's findings and a recommendation as to future Board action on this issue.

BACKGROUND INFORMATION

Historical Information: The Creche has been placed in Boniface Circle for approximately two weeks every Christmas season since about 1957. The figures are wood carvings made by Mr. Robbins, a well known Scarsdale sculptor. The cost of $1,625 was donated by various churches in the area. The erecting and maintaining of the Creche each year is covered by contributions from member churches to the Scarsdale Creche Committee. The "dues" are $25 which cover all costs including insurance and the purchase of green to create an appropriate setting. There is no public cost. The Creche is stored in a private home when not on display. The Creche Committee complies with any directives given by the Village Board. A sign, prominently displayed, states that "This Creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization."

The Creche Committee: The Scarsdale Creche Committee is a private organization with representatives from churches in the area. The current churches represented are:

Current Representative	Address	Church	How Chosen
Patricia Curran (Chairman)	1 Rochambeau Road Scarsdale	Immaculate Heart of Mary	Guild Representative
Cynthia Barsuhn	307 Boulevard Scarsdale	Trinity Lutheran	Guild Representative
Maria Pedulla	63 Brendon Hill Road Scarsdale (Yonkers)	Our Lady of Fatima	Pastor Appointment
Grace Fellows	193 Old Wilmont Road Scarsdale (Eastchester)	Church of the Good Shepherd	Church Council
Teresa Vohnout	23 Lakeview Avenue Scarsdale (Eastchester)	Grace Lutheran	Church Council
Mary Tully	23 Leatherstocking Lane Scarsdale	Church of St. Pius X	Pastor Appointment
Joan Mann	24 Sherwood Place Scarsdale (Edgemont)	Scarsdale Community Baptist	Deacons Appointment

Scarsdale Congregational Church, Greenville Community Church, Hitchcock Presbyterian Church and the Church of St. James the Less no longer send representatives to the committee. It is interesting to note that the current composition of the committee includes only three Village residents.

Suit Against the Village, December, 1976: Leonard H. Rubin, a Scarsdale attorney with the New York Civil Liberties Union brought a suit against the Village for removal of the Creche from Boniface Circle. (Mr. Rubin has lived at 34 Farley Road since November 1975.) The suit which was filed in district court in New York City stated that authorization by the Village violated the 1st and 14th amendments. Judge Robert J. Ward dismissed the case ruling that the Federal Court has no jurisdiction over local municipalities. During 1977, 1978 and 1979 permission was granted to place the Creche at Boniface Circle.

EVENTS OF SPRING, 1980—FALL, 1980

Meeting of the Council with the Scarsdale Creche Committee: On may 29, 1980 the Council met with members of the Scarsdale Creche Committee. There was an excellent dialogue regarding mutual concerns. There was lengthy discussion regarding the potential human relations conflict resulting from the request. Last season's Letters to the Editor were distributed. Alternative sights for the Creche were considered:

Creche on Church Property: Church property was suggested as a more suitable place for the Creche. Many churches have offered their grounds for the display. The Committee rejects this option because in their opinion no church property has a place which fits the purpose for which the Creche was made: a central place where those who so desire can pause for a few moments and enjoy a lovely piece of art. The Creche Committee feels that the topography of the area churches is not suitable, that many churches already have Creches, and that you cannot enjoy the beauty of this Creche when passing by in an automobile.

Creche on Private Property: Placing the Creche on private property was discussed. The Council considered three locations and the Committee agreed to consider this recommendation if permission were granted by the owners. The Frog Prince Proper and the Common Market (soon to be the Manhattan Bank for Savings) both declined the offer made by the Council Chairman over the summer. The station area was investigated and initial talks with the MTA were favorable. However, in mid-discussion it was learned that the Village owned to within three feet of the station platform. No other points in the Village were deemed suitable.

The Creche Committee was grateful to have had a chance to talk to an official Village group. The meeting was beneficial in that all issues were aired and more fully understood. The

Council Chairman has kept the Creche Committee Chairman informed regarding all events since the May meeting.

Meetings with Local Clergy: The Council Chairman met with local clergy over the summer and into the Fall. This included a presentation to the Clergy Club at their October luncheon gathering. At these times complete information was given regarding all aspects of the Creche issue. It was abundantly clear that the clergy has as diverse feelings as the community. No helpful suggestions were forthcoming, but again the dialogue was considered important as far as human relations are concerned.

Meeting of the Council Chairman with the Creche Committee, November 2, 1980: The chairman of the council made an official request to the Creche Committee to place the Creche on church property. (See attached letter) At this time the chairman gave each committee member copies of last season's letters to the editor and thoroughly discussed the council's reasons for making the request. The Scarsdale Creche committee voted unanimously to deny the request.

DIFFERING POINTS OF VIEW ON THE CRECHE IN BONIFACE CIRCLE

Pro

1. Long tradition in the community, therefore should be continued.
2. Village should permit free exercise of religion which the first amendment protects. By doing so, it is not promoting religion.
3. Previous court decisions uphold the legality of public land for a Creche provided it is not erected by government or at government expense.
4. All religious symbols should be displayed. More symbolism is needed in our lives. The Village should make room for all kinds of expression.
5. Removal of the Creche from Boniface (or denial of the request) would cause more unrest than letting it remain.

Con

1. Violation of the constitutional principle of separation of church and state.
2. Use of public land for a religious statement is inappropriate in Scarsdale.
3. Potential division of the community.
4. If Creche makes certain members of the community hostile (however small the number) that it should not be on public property; it defeats the purpose of the Creche.

RECOMMENDATION TO THE BOARD OF TRUSTEES

All members of the Council feel that the Creche would be placed more appropriately on non-public property. All possible avenues have been explored. Church sites are not acceptable to the Creche Committee and suitable private property locations are not available. After consultation with the Village Attorney, the Council sees no legal problem as no public time or money is involved. The Council agrees unanimously that it is less devisive to good community relat· ; to allow this long standing tradition to be maintained rather than to deny permission. For these reasons, the Council makes the following recommendation:

THE ADVISORY COUNCIL ON HUMAN RELATIONS RECOMMENDS THAT THE VILLAGE BOARD OF TRUSTEES ACCEPT THE REQUEST OF THE SCARSDALE CRECHE COMMITTEE TO ERECT ITS CRECHE AT BONIFACE CIRCLE DURING THE 1980 CHRISTMAS SEASON.

Lynne B. Clark (Mrs. Merrell M.)
Chairman, Advisory Council on
Human Relations

November 20,1980

To: Mayor Jean Stone and the Board of Trustees

From: The Advisory Council on Human Relations

Subject: The Request of the Scarsdale Creche Committee to Place the Creche at Boniface Circle

RECOMMENDATION TO THE BOARD OF TRUSTEES

Members of the Council believe that the Creche should be placed on non-public property and have continued to encourage the Scarsdale Creche Committee to seek sites other than Boniface Circle or to withdraw their request. As no other locations are available in the center of the Village where the Creche Committee will be seen easily and church sites are not acceptable, the Creche Committee will bring their request again to the Village Board. The majority of the Council believes that it is less devisive to good community relations to allow this long standing tradition to be maintained rather than to deny permission. Therefore, the Council makes the following recommendation:

THE ADVISORY COUNCIL ON HUMAN RELATIONS RECOMMENDS THAT THE VILLAGE BOARD OF TRUSTEES ACCEPT THE REQUEST OF THE SCARSDALE CRECHE COMMITTEE TO ERECT ITS CRECHE AT BONIFACE CIRCLE DURING THE 1981 CHRISTMAS SEASON.

Lynne Clark, Chairman
Mercedes Broderick
Eleanor Finney
William Flynn
Rita Greenland
Joan Kennedy
Jack Nusbaum
Raphael Scobey
Peter Strauss

November 3, 1981

Last years detailed report is attached for reference.

Advisory Council on Human Relations
Village of Scarsdale
Scarsdale, New York 10583

Mayor Jean Stone and the Board of Trustees
Village of Scarsdale
Scarsdale, New York 10583

November 18, 1982

Subject: Recommendation regarding the Creche at Boniface Circle

The Advisory Council on Human Relations appealed once again to the Scarsdale Creche Committee to eliminate the Creche controversy by not bringing their request to the Village Board of Trustees and by finding a permanent non-public site for the display. The Council's concern is the harmony of all the people of Scarsdale. There was no doubt in the minds of all Council members that the recommended action to the Scarsdale Creche Committee would be in the best interests of the Village. Any other patch would lead to more controversy, more acrimony between residents of opposing views, more unpleasant publicity for the Village, the likelihood of expensive legal action and lasting bitterness.

Unfortunately, as in the past, our unanimous and earnest plea did not dissuade the Creche Committee. Accordingly, as asked by the Trustees, the Advisory Council of Human Relations voted on whether or not to recommend to the Trustees granting the request. This was a most agonizing choice. Either "yes" or "no" causes a loss. It is a no-win situation.

The Council was split on the issue. Three recommended denial. Five recommended approval. Those who recommended approval expressed the hope that, by proceeding with the display, a likely suit would result in a comprehensive and final hearing on the matter in a court of law, thereby freeing the people and their elected officials of what has been a chronic, holiday season, emotional crisis. Both "yes" and "no" members sought the same objective, each believing the path selected would more likely establish a permanent undisputed pattern. This objective was our central concern. Other

issues of philosophy or morality or politics were considered less important than permanence as a determining factor in stopping annual discord. The "no's" believe the Trustees can accomplish this result. The "yes's" believe the Trustees cannot accomplish this result but that the court will, one way or the other.

Lynne Clark, Chairman
Mercedes Broderick
Eleanor Finney
William Flynn
Rita Greenland (Absent)
Joan Kennedy
Roseanne Raab
Jack Stern

November 29, 1979

The Scarsdale Creche Committee
c/o Mrs. John J. Curran
One Rochambeau Road
Scarsdale, New York 10583
Dear Mrs. Curran and Members of the Committee:

At the Village Board meeting of Novembver 27, permission was granted by the Board of Trustees for the Creche Committee to erect a creche at Boniface Circle during the coming Christmas season.

Permission has been granted on the following conditions:

1. A similar sign must be installed, as last year, to read, "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization."
2. The Scarsdale Creche Committee shall do all the necessary work in erecting and taking down the creche at no public expense.
3. Boniface Circle must be restored to its previous condition after the creche has been taken down and removed.

It was strongly recommended by all the Trustees that the Creche Committee consider rotating the creche among various Village churches in future years.

Very truly yours,

Richard F. Herbek
Assistant Village Manager

RFH:jb

December 11, 1980

Mrs. John J. Curran
1 Rochambeau Road
Scarsdale, New York 10583

Dear Mrs. Curran:

Your request that the creche be erected on Boniface Circle again this year was acted upon at the December 9, 1980 meeting of the Board of Trustees.

As you are well aware, the request was approved by a 4 to 3 vote of the Board.

Permission has been granted on the following conditions: the Creche Committee shall 1) prominently display a sign which reads "This Creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization", 2) provide the Village with satisfactory liability coverage, and 3) erect, remove and clean up after the display at no cost to the Village.

Mayor Jensen pointed out that in light of the division caused by this issue, the Board strongly urges that next year the Committee erect the creche at a location other than Village-owned property.

Very truly yours,

Christopher J. Russo
Administrative Assistant

CJR:aew

May 13, 1982

TO THE BOARD OF THE SCARSDALE FOUNDATION
FROM: JEAN STONE, MAYOR OF THE VILLAGE OF SCARSDALE

On behalf of the Board of Trustees of the Village of Scarsdale and, most particularly, myself, I want to thank you for your consideration of the Heritage Plaza proposal that I've sent to you.

I have been able to give more background information leading up to this proposal to Mrs. Stix and Mr. Ullman, and I understand they presented the proposal to you at your May 5th meeting. I am grateful to them for the extra time they have given to this, particularly, because like all of you, their discretionary time is limited and highly valued.

I hope you will find it helpful if I add my own thoughts and experiences to theirs. I am also attaching a copy of a letter from the Chairperson of the Creche Committee, Mrs. Pat Curran.

In your study of our community future, I'm sure it is apparent to you, as it is to all of us who serve the Village in various capacities, that ours is a community rich in ethnic, religious, cultural and political mix. In my experience, we cover the complete range. We are very liberal—we are very conservative. We are religiously diverse and our heritages vary greatly.

For the past few years, when the Creche Committee has come to the Village Board for permission to erect the Creche on Boniface Circle, the vote of the Trustees has been close one way or the other. I suspect it will continue to be so, varying from year to year. Whereas no one has been opposed to the concept of displaying the Nativity scene during the Christmas season, many people feel that a religious display properly belongs on private property, regardless of conflicting legal interpretations. The Creche Committee does not enjoy the procedure whereby they must apply annually to the Board and would like a resolution once and for all. I think the community

would agree. The Village Board is not in a position to resolve it.

Since last January we have been trying to find an answer—an acceptable "do-able" compromise—not a passing-the-buck—that would answer this ongoing disruptive, destructive situation, as well as offer an added community amenity as well. Our concept of a Heritage Plaza was the result. In the earliest stages we shared this concept with the Creche Committee, the Advisory Council on Human Relations, other clergy, such as Rev. Scottie Griffin and Rabbi Jack Stern, and, universally, the concept has been well received. I have also touched base with the Chairmen of the Friends of the Parks and the Scarsdale Environmental Council who, because they are still holding this as confidential information, have not discussed it with their Boards. However, their initial reaction was favorable.

Unfortunately, we have had to send the permissive legislation to Albany at such a late date due to the checking of deed restrictions, that we were pushed into a "chicken-or-the-egg" procedure of having to use your name as the recipient of this property although we are all quite clear that no decision has been reached on your part. We also made that clear to the sponsors of the bill. I appreciate your cooperation in allowing us to proceed in this way. There are far too many obstacles in the way of this legislation for us to be optimistic about its passage. Even if it is passed, it is only permissive—we *may* proceed—not we *will* proceed—with the proposal.

We will, of course, go to Public Hearing and would do so even if not required by law, as public acceptance of this idea is what would make it viable. Of course, no plan is perfect or without some problems and some concerns to be addressed. Considering the alternative, however, I regard this as a constructive, positive and forward-thinking proposal. It answers the community need with the further opportunity of enriching our community life.

I'm also attaching a copy of a memo from Trustee Martin Bowen. Whereas at that time he suggested the Chamber of Commerce as the recipient, all of the Board is now agreed that

the Foundation is the agency that is uniquely qualified for this type of community role.

Please feel free to call me with any comments or questions you may have regarding Heritage Plaza. It is a project about which I care deeply. Since so many people have now been exposed to this idea, I feel the correct course is to tell the residents that the bill has been filed, even if its success is far from certain. I plan to do this at one of our two remaining May meetings . . . the 18th or the 25th.

My sincerest thanks for your help in this matter.

Jean Stone
MAYOR

April 29, 1982

Dear Mayor Stone,

Thank you for your letter which I received yesterday. Although there seems to be a great deal of work still to be accomplished your letter indicated that much has already been done. I am planning to duplicate your letter and will send sufficient copies to each of the Creche representatives so they may share this information with their pastors, ministers or Church Boards.

Speaking for myself, I was pleased with the tone of and the outcome of the meeting we held over in the firehouse. It indicated not only a concern over the question of the Creche but a sincere desire on the part of everyone to resolve the problem in a manner that will be agreeable to all.

It is my hope that the plans that are being worked on at present will become a reality. It is my belief that if we accomplish this, Scarsdale's "Heritage Plaza" will become a model to many other communities.

Again, my thanks for your efforts.

Sincerely,

Pat Curran

DATE: 3/15/82

TO: Mayor Stone & the Board of Trustees

FROM: Martin Bowen

SUBJECT: Heritage Plaza

The following memo formally proposes an idea that, as some of you know, I have been mulling over since last November.

There is no question that this approach is recommended to take the Creche issue out of the public limelight. In my opinion, just because we want it to, this issue is not going to go away. It has been an issue for years in Larchmont where it is up for vote of their Village Board year-after-year and has been voted in and out depending on the composition of the Board. Unfortunately, in Scarsdale, such a situation would in my opinion aggravate divisiveness and subject the community to unnecessary, and unpleasant, publicity.

The preferred solution, of course, would be to find a suitable location on private property which would meet the criteria of the Creche Committee for "downtown" visibility and would be an acceptable site to that committee. This has been diligently pursued in the past without much success. Given the situation in 1981, it should be pursued once more on the assumption that a private establishment might now be receptive to offering a site just to avoid such unpleasantness again.

However, failing that, this plan could form the basis of discussion for a viable alternative. It is put forth with my understanding that there is no law that precludes the private placement of religious displays on public property and that, in fact, there is case law precedent affirming its legality. As long as that remains the case, I urge my associates to look for a solution to this problem which can help restore good will and which can take out of public hearing this disruptive issue. I believe that my recommended approach allows for community tolerance of varying beliefs.

March 12, 1982

Proposal for the Establishment of Heritage Plaza

This memorandum recommends the establishment of a small plaza at either Boniface Circle or Chase Road Park, to be known as Heritage Plaza. This plaza would provide display space for any bona-fide organization, the majority of whose members live in the Village of Scarsdale. It would be used to promote an aspect of the United States political or religious heritage celebrated by a recognized national or religious holiday where some or all, Americans are released from work or school.

Examples of such recognized holidays include, but are not limited to,

Columbus Day	Thanksgiving
Washington's Birthday	Christmas
Martin Luther King Day	Easter
Independence Day	Rosh Hoshanna
Memorial Day	Election Day
Labor Day	

Days with primarily commercial significance such as Valentine's Day, Halloween, Mother's Day and any fund-raising commemoration such as Community Chest Day would not be included as recognized holidays for this purpose.

The plaza would be leased to the Scarsdale Chamber of Commerce, who would receive all applications for use of the plaza under the following general considerations:

1. Applications would be considered for any given calendar year in order of receipt in that year. Each application must be described by photograph or artist's rendering including all proposed physical dimensions. Only one display would be accepted for each required holiday.
2. Each initial application must be accompanied by verification of the residential makeup of the organization

or by a petition signed by 100 registered Village residents. Subsequent applications must be signed by a majority of the organization's governing board or by 100 registered Village residents.

3. Each application must be accompanied by whatever indemnification certification the Scarsdale Chamber of Commerce and/or the Village might require.
4. All costs and liability for any display are to be borne by the private organization making application to the Chamber of Commerce.
5. The Chamber of Commerce, through majority vote of its governing board, may reject any display it deems is not in good taste, in the generally-accepted meaning of that term.

The role of the Village, through the Village Manager's office, would be limited to:

1. Establishing initial guidelines for use of the plaza as these guidelines relate to size of displays allowed, necessary signing and indemnification needed and rules for construction and dismantling of any displays.
2. Review of design specifications and approval based on safety considerations.
3. Maintenance of the plaza grounds consistent with the character of the land around it.

The lease to the Chamber of Commerce, which would be at no rental charge, could be terminated in one of two ways:

1. By the Chamber in writing to the Village Board to be effective at midnight, December 31, of that calendar year.
2. By the Village to be effective on a date set by resolution of the Village Board to accommodate a plan passed by resolution of that Board which would change the character and/or use of either Boniface Circle or Chase Road Park, whichever site the Heritage Plaza is contained within.

Heritage Plaza is proposed as a place where the historical and religious values of our society can be celebrated in a quiet, dignified manner through displays that can be enjoyed or respected by all Scarsdale residents.

MEMO TO: BOARD OF TRUSTEES
CAROL STIX, PRESIDENT, SCARSDALE FOUNDATION
PAT CURRAN, CHAIRMAN, CRECHE COMMITTEE
HUMAN RELATIONS ADVISORY COMMITTEE
LOWELL J. TOOLEY, VILLAGE MANAGER

FROM: MAYOR STONE

RE: CHASE ROAD PARK BILL

July 1: Cecile Singer, of Gordon Burrows' office, called today to tell me that Ken Shapiro, head of the Assembly Rules Committee, was willing to bring our Chase Road lot bill out of Committee and Assemblyman Burrows would continue to push it, but a very large and ugly floor fight loomed ahead. The A.C.L.U. has really gone all out on this one. Cecile said she had never seen anything like it and it seemed certain to turn into a "religious war" with *heavy* and sensational publicity.

Since 1) the original purpose of the bill was to avoid this kind of confrontation; 2) we could very likely have lost the floor fight, and if we won it, the A.C.L.U. would bring the fight here with a suit; 3) the acceptance by the Scarsdale Foundation was far from certain and would be less so with this kind of publicity, and 4) I'd hate to see Scarsdale be the focus of this kind of inflammatory publicity—I asked Cecile to advise Mr. Shapiro to let our bill die in Committee.

Of course I'm disappointed because I thought we were on our way to a workable compromise, but we gave it our best shot.

This memo is for your information only at this time, but I wanted you to know.

JS:JFS

June 10, 1982

Dr. Howard Goldin, P.C.
646 Park Avenue
New York, New York 10021

Dear Dr. Goldin:

This acknowledges receipt of your letter of June 2 and your frank expression of your views, which I certainly respect. However, I am sure that you appreciate the fact that the Board's responsibility is to try to resolve a troublesome and potentially divisive problem in a manner that will ensure community-wide acceptance. I must respectfully suggest that your views on the Constitution may be neither accurate nor representative of those of the community.

In this connection, I would respectfully call your attention to a decision by the Federal Court of Appeals in Washington, D.C., *O'Hair* v. *Andrus*, 613 F2d 931 (1979) which was brought to my attention recently. I think this case might be particularly relevant to your view that nondiscriminatory use of public land by religious groups somehow violates the Constitution. The case involved a challenge to the Interior Department's granting a permit authorizing the public gathering on the National Mall, the Washington Monument grounds, the Ellipse and the Lincoln Memorial Green for the purpose of an outdoor Mass by Pope John Paul II. Plaintiffs alleged that the issuance of this permit violated the First Amendment. The Court rejected this claim stating:

> "Parkland has an historic identification in the Anglo-American tradition for communication among citizens. In *Hague* v. *CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed.2d 1423 (1939)* the Court declared, in an opinion by Justice Roberts:
>
> 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such

use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.'

"This doctrine was quoted and followed in *Kunz* v. New York, 340 U.S. 290, 293, 71 S.Ct. 312, 314, 95 L.Ed. 280 (1951), where the Court, in an opinion by Chief Justice Vinson, held it applicable to the use of these public places 'for the expression of religious views' and the holding of religious meetings."

While neither you nor I are constitutional experts, it seems to me this case, at a minimum, raises a substantial question as to the accuracy of your views as to the Constitution. It indicates, at least, that our problem cannot be solved simply by unthinking citation of the First Amendment.

Sincerely,

Jean Stone
Mayor

JS:jb
cc: Board of Trustees
Lowell J. Tooley
John F. Holden, Jr.

No member of the Board can take any pleasure in being faced again with a decision on the annual application of the Creche Committee. It is a matter the importance of which has been magnified out of all proportion. On the other hand, it involves strongly held religious loyalties and widely misconceived principles of constitutional law, and whichever way we decide, substantial numbers of our citizens will feel betrayed by their elected representatives.

We did not have to be placed in this position. The Creche Committee has been offered two alternative options for placement of its nativity scene on centrally located private property, one on the former Frog Prince property which is no less central than Boniface Circle, and the other on grounds of the Baptist Church which is one of its own constituent congregations. A very substantial number of our citizens, of all religious persuasions feel strongly that religious displays belong on private and not public property. Several of Scarsdale's leading Christian churches withdrew from the Creche Committee in past years because they shared that belief. Nevertheless the Committee has chosen not to accept either alternative offered to it but has again insisted on the creation of a public issue by leaving the decision in the hands of the elected representatives of all the citizens. I am critical of their action because I believe that in forcing that decision the Committee has not acted in the best interests of the community. Scarsdale does not need internal discord or national notoriety. However, so be it. All of us have searched our souls in this manner, and a great deal of legal research has been done by members of the law committee, the results of which have been made available to all the trustees. I do not believe the vote of any of us is likely to be changed by what is said here tonight. However, we — and you — are condemned to listen.

This Board is a legislative body, not a Court of law, and I think that any extended analysis of the legal authorities relating to the Creche issue is out of place here. I propose only to state my conclusions from a consideration of all the material assembled by the Law Committee and made available to us from other sources, including the Civil Liberties Union.

In previous years it was my opinion that granting the permission requested by the Creche Committee for the use of Boniface Circle without any expense or participation by the Village, and with a prominently displayed notice negating any Village involvement or endorsement, does not violate the Establishment Clause. Nothing which has been brought to our attention has led me to change that opinion; on the contrary, it has been fortified. A reading of the opinions in *Donnelly* vs. *Lynch*, the Pawtucket case, which has been prominently in the news and in our minds, reveals that that case described by the head of the RI Chapter of the ACLU as the first case in which a Fed appeals Ct had found a gov't sponsored creche unconstitutional differs fundamentally from the situation involved in Scarsdale. In Pawtucket the Creche was bought, paid for, owned, scheduled and evicted by the City. The Court rightly held this to be an endorsement of the religious beliefs implicit in or evoked by the nativity scene and an involvement in religious [acts?] which run afoul of the Establishment Clause. In Scarsdale the Village is not involved in the arrangements, it incurs no cost and [ ] the posted notice which the Village requires and the Creche C. erects, it is expressly disassociated from any official approval or endorsement, thereby complying with standards laid down about 10 years ago by the US Ct of Appeals for the D of C Circuit in the leading case of *Allen* v. *Morton*. This Board repeatedly indicated at least until last year, that it would afford the same permission to a display by the adherents of any other group, religious or non-religious, and on the same conditions. If we grant permission this year, it must be on that understanding.

In the past the votes of some trustees who opposed granting the committee's application were based at least in part, on the belief that the grant of permission would violate the spirit if not the letter of the First Amendment. I believe this view is founded in misconception. It suggests that the meaning of the Establ Cl is inexact, that its scope is a gray area, in which we are free to exercise our discretion. The courts have said, however, that for better or worse, the making of fine distinctions is the essence of Establ Cl analysis. These distinctions

and this analysis are the basis of the decisions of our courts, and I do not believe that it is open to us, in an area where authoritative precedent exists, to extend the prohibition of the First Amendment to cases which we conceive to violate its spirit. This is tantamount to saying that if we were a court we would hold the granting of the requested permission to be a violation of the Establ Cl. In the first place we are not a court. In the second place the decisions are clearly to the contrary.

The Establ Cl and the Free Exercise Cl were conceived as supplemental and compatible means to the realization of the goal of religious freedom. Despite this intended harmony, tension has often surfaced between the two clauses. The Supr. Ct has held that the Free Ex. Cl. itself compels government to make *some* accommodation to religious realities and needs. So long as government aid goes no further than arguably required by this principle there is no violation of the separation required by the Establ Cl.

In any attempt to reconcile the religion clauses of the First Amendment a principle of accommodation prevails. The legitimacy of non-discriminatory voluntary religious expression in parks has repeatedly been recognized by the Courts. Until its action a year ago which is in essence under review tonight, it has been the openly declared if unwritten policy of this Village that the right of display in Boniface Circle would be made available to all groups. That no other groups have applied to Village does not render the Board's past practice discriminatory.

Although we are obviously not bound by the recommendation of the Hum. Rel. C, I have always felt, and have so stated, that having created that body to guide us on such issues, we must give great weight to their conclusion. I still adhere to that belief, and I certainly agree that a permanent resolution of this issue, either way, is preferable to the annual confrontation with which the Creche Committee has favored us. Unfortunately, I am not sanguine about the likelihood of our being relieved of the issue by judicial mandate. It is by no means certain that a vote to permit the use of Boniface Circle will lead to the suit threatened by the ACLU, based on an alleged

violation of the Establ C1. If such a suit is brought, I believe it will only lead to confirmation that we are not prohibited from permitting such use, which will leave this board with its annual problem as to whether we *should* permit it. On the other hand if we deny permission, we have no assurance that the advocates of the Creche Committee position will bring suit to compel our consent although I have heard the Committee was taking steps to retain counsel. And there is obvious doubt whether such a suit would be successful, although I incline to believe that the Free Exercise forces may have the better of the Constitutional argument. If the suit is not successful, or if no suit is brought, this Board will be left with its annual dilemma. And if suit is brought by either side, the Village faces heavy legal expenses and a prolongation of this controversy for an extended period. As Lynne Clark says in her HRC report, it is a no-win situation.

I am left with my feeling that we should follow the recommendation of the HRC, but this time for different reasons than stated in their report. I feel as the Council did in past years, that approval will cause less bitterness and dissension than denial. Certainly last year's experience bears this out. That there was far more widespread displeasure expressed is only part of the story. More than a little of it was couched in terms which not only showed a total incomprehension of the dilemma facing this Board, but which can only be described as un-Christian. That being the case, my vote may be perceived as pragmatic and cynical. Again, so be it.

Regardless of this Board's vote, it remains in the exclusive control of the Creche Committee to spare Scarsdale the controversy facing us by voluntarily electing to put the creche on private property, and I urge them to do so even if this Board approves their application tonight.

September 12, 1981

The Village Board
Scarsdale, New York.

Attention: Mayor Smith

Gentlemen:

Speaking on Rosh-ha-shanah this past Sunday, at the Stephen Wise Free Synagogue, 30 West 68th Street, New York City, the Rev. Dr. Edward E. Klein said:

"Every man needs an identity that reaches into his ancestry and reaches out through affiliation with his fellows.

"Having enjoyed more than three centuries of freedom in America, we are better Americans for being better Jews. Our rich ethical tradition can only enhance our contributions to America."

This quote of Rabbi Klein very succinctly points up what America really is; a country made up of different peoples from different backgrounds, with different cultures, customs and different religious faiths, welded together into one citizenry — American, which under a religiously devised constitution allows and guarantees these different people to live and flourish collectively and individually.

The American Christmas that most of us know reflects in modified form the customs of many widely and separated lands in Church and home and shop.

Our Christmas cards, our yule logs, our boar's heads, our plum puddings, our Santa Clauses, our stockings hung at the fireplace, the Christmas tree, the Christmas wreath, the Christmas carol and the Christmas creche as well as other traditions reflect foreign cultures. The turkey seems to be our only contribution materially speaking, to Christmas.

We believe our Creche is such an identity as referred to by Rabbi Klein. It is not erected for the purpose of proselytizing, or the forcing of one religion upon another, nor does it seek to be preferred constitutionally over other religious faiths in our Country. It is rather just another manifestation of what Christ-

mas means to us who are Christians in this Country, particularly in our community, and throughout most parts of the world.

We believe, indeed, our Creche to be an identity: Christian in nature, but deep rooted as marrow is to the bone. It is a reflection of what we hold dearer than life itself. History has shown time and time again that while peoples may differ and may dispute on many issues, the scars derived from controversy over religious misunderstandings go the deepest. Americans have enjoyed freedom to pursue religious enjoyment and have erected creches on public and private property for over three centuries unmolested. It is unthinkable that it should come to a conclusion now. How much better it would be to continue on the three centuries of understanding and harmony and mutual respect for each other's way of life.

In asking that permission be granted to erect our Creche here in Scarsdale, we are mindful that while we seek to preserve our rights, we seek to preserve also the rights of all faiths which may or may not at some future time wish to use public property to reflect in some way their religious persuasions. We would welcome all faiths to share with us simultaneously or otherwise this great American heritage.

Respectfully yours,

/s/ Mrs. W. B. Oakes
/s/ Mrs. H. B. Kinsell

The Scarsdale Creche Committee
Scarsdale, New York

November 23, 1976

The Village Board
Scarsdale, New York

Gentlemen:

The Scarsdale Creche Committee is aware of some possible opposition to the placing of the creche once again at Boniface Circle. Because we have not been contacted directly by those who may be oppposed we believe that these feelings are shared by only a few of our citizenry. We do, however, respect the right of all people to express their views and it is for this purpose we wish to make our feelings known.

Since 1957 permission has been granted by the Village to erect a creche which has been a source of edification to the community. Only once has this tradition been questioned and after examination of the issue by the Village Board in 1961, permission was granted. Over the years, the members of the Creche Committee have never received any adverse comments. On the contrary, many of our residents have taken time to express their appreciation.

To us the creche represents our Faith, a Faith not of time or place but which calls us to be witnesses to our beliefs; a Faith deeply rooted in traditions passed down by our ancestors in the hope of our continuing to share this inheritance with our children; a Faith which seeks tolerance and love, compelling us to live in harmony and understanding, and which demands from us a mutual respect for all.

We would consider the removal of the creche from Boniface Circle an erosion of our spiritual values, an affront to the drafters of our Constitution whose intent was to protect religious freedom and an injustice to the people of Scarsdale whose inter-faith activities have grown in stature over the years.

We therefore ask the members of our Village Board to realize that our purpose is not to exclude but to share what we

feel is the best in us, not to promote one religious view over another, but to invite others to express their beliefs, and finally, not to alienate but to strengthen our relationships based on the message of the season, peace and good will.

Respectfully yours,

The Scarsdale Creche
Committee

SCARSDALE CRECHE COMMITTEE

December 20, 1978

Mr. Richard F. Herbek
Assistant Village Manager
Village of Scarsdale
Scarsdale, New York, 10583

Dear Mr. Herbek:

In response to our telephone conversation of Monday, December 18th concerning the sign on the Scarsdale Creche I would like to inform you about the steps taken to comply with your request.

On Tuesday, December 19th in the morning it was necessary to remove the original sign since we had need of some letters which we were unable to purchase in three local stores.

On Wednesday, December 20th at 6:45 A.M. a new sign stating, "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization," was posted on the creche. This sign measures 11" x 14½" as compared to the original sign which was 7" x 11½". It has been placed in the same position as former years, that is, facing the sidewalk on Boniface Circle.

May I draw to your attention that it is not possible for anyone to see this sign in the evening or at night since the street light has been off, to my knowledge, since December 13th in spite of the fact that I personally repoprted this fact three times from December 14th through December 18th.

I hope the above information will be considered satisfactory to the village trustees and if there are any further problems please do not hesitate to call me.

My best wishes to you and your staff for a Happy New Year.

Sincerely yours,

for The Scarsdale Creche Committee

Mrs. John H. Curran
One Rochambeau Road
Scarsdale, New York 10583
472-1673

One Rochambeau Road
Scarsdale, New York 10583
December 7, 1979

Mr. Richard F. Herbek
Assistant Village Manager
Village of Scarsdale
Scarsdale, New York 10583

Dear Mr. Herbek:

On behalf of the Scarsdale Creche Committee, I would like to thank you for your letter granting us permission to erect the Creche on Boniface Circle during the Christmas season. Be assured that the resolution voted upon and passed by the Trustees will be adhered to in every detail.

The suggestion offered to the Scarsdale Creche Committee to place the Creche on church property on a rotating basis had been considered in the past. For a variety of reasons the placement of the Creche on these various sites was not thought feasible. In addition, the members of the committee have unanimously agreed that the Creche was originally intended to express the ecumenical spirit that exists among the churches in Scarsdale. To put an end to this long standing tradition in our community is not the choice of the committee.

We thank you for your interest and concern and extend our best wishes for the New Year to you and the Village Trustees.

Sincerely yours,

_____
for The Scarsdale Creche Committee

Mrs. John J. Curran
(914) 472-1673

cc: Scarsdale Clergy Association

cc: Manager & Bd. 12/13/79

December 1, 1981

My dear Mrs. Stone:

Last election time in Scarsdale I voted for you. Therefore, I feel quite concerned that you did not cast your vote with the three members of the Village trustees who favored the Creche.

Last year the vote was 4-3 to allow the Creche to remain in Boniface Circle.

I cannot understand how anyone could possibly object to our honoring the Son of God on His birthday—even on public property.

The Court threw out the 1976 suit. Judge Robert G. Ward must have studied the case well before he made his decision.

Please don't claim, as you did, that most of the calls you received supported your decision. Impossible!!

Truly yours,
(Mrs.) Ann Cawley

ANNUAL
VILLAGE OF SCARSDALE
CHRISTMAS CAROL SING
Sponsored by the Town Club
1982

THANK YOU to the . . .

Scarsdale Chamber of Commerce
Scarsdale National Bank
Scarsdale Inquirer
Bank of New York
Union Savings Bank
Scarsdale High School Band
Boy Scout Troop 410
Girl Scout Troup
Village Recreation Department
Rotary Club of Scarsdale
Manhanttan Savings Bank
Westchester Federal Savings & Loan

. . .from Town Club. . .
for joining us in support of
the 1982 Christmas Carol Sing.

THE FIRST NOEL

THE FIRST NOEL, THE ANGELS DID SAY,
WAS TO CERTAIN POOR SHEPHERDS IN
FIELDS AS THEY LAY,
IN FIELDS WHERE THEY LAY KEEPING
THEIR SHEEP,
ON A COLD WINTER'S NIGHT THAT WAS
SO DEEP

NOEL, NOEL, NOEL, NOEL, BORN IS THE
KING OF ISRAEL.

THEY LOOKED UP AND SAW A STAR,
SHINING IN THE EAST BEYOND THEM FAR,
AND TO THE EARTH IT GAVE GREAT LIGHT
AND SO IT CONTINUED BOTH DAY AND NIGHT

NOEL, NOEL, NOEL, NOEL, BORN IS THE
KING OF ISRAEL.

IT CAME UPON THE MIDNIGHT CLEAR

IT CAME UPON THE MIDNIGHT CLEAR, THAT GLORIOUS SONG OF OLD,
FROM ANGELS BENDING NEAR THE EARTH, TO TOUCH THEIR HARPS OF GOLD,
PEACE ON THE EARTH, GOOD WILL TO MEN, FROM HEAVEN'S ALL GRACIOUS KING,
THE WORLD IN SOLEMN STILLNESS LAY, TO HEAR THE ANGELS SING.

STILL THROUGH THE CLOVEN SKIES THEY COME,
WITH PEACEFUL WINGS UNFURLED;
AND STILL THEIR HEAVELNY MUSIC FLOATS,
O'ER ALL THE WEARY WORLD;
ABOVE ITS SAD AND LOWLY PLAINS
THEY BEND ON HOVERING WING,
AND EVER O'ER ITS BABEL SOUNDS

HARK THE HERALD ANGELS SING, GLORY TO THE NEW BORN KING,
PEACE ON EARTH, AND MERCY MILD, GOD AND SINNERS RECONCILED.
JOYFUL ALL YE NATIONS RISE, JOIN THE TRIUMPH OF THE SKIES,
WITH THE ANGELIC HOSTS PROCLAIM, CHRIST IS BORN IN BETHLEHEM.

HARK! THE HERALD ANGELS SING, GLORY TO THE NEW BORN KING.

HAIL THE HEAVEN BORN PRINCE OF PEACE! HAIL THE SUN OF RIGHTEOUSNESS!
LIGHT AND LIFE TO ALL HE BRINGS, RISEN WITH HEALING IN HIS WINGS.
MILD HE LAYS HIS GLORY BY, BORN THAT MAN NO MORE MAY DIE,
BORN TO RAISE THE SONS OF EARTH, BORN TO GIVE THEM SECOND BIRTH.

HARK! THE HERALD ANGELS SING, GLORY TO THE NEW BORN KING.

O COME, ALL YE FAITHFUL

O COME ALL YE FAITHFUL,
JOYFUL AND TRIUMPHANT
O COME YE, O COME YE TO BETHLEHEM!
COME AND BEHOLD HIM, BORN THE KING OF ANGELS!
O COME LET US ADORE HIM, O COME LET US ADORE HIM,
O COME LET US ADORE HIM,
CHRIST, THE LORD!

SING, CHOIRS OF ANGELS,
SING IN EXALTATION,
O SING ALL YE CITIZENS OF HEAV'N ABOVE,
GLORY TO GOD, GLORY IN THE HIGHEST!
O COME LET US ADORE HIM, O COME LET US ADORE HIM,
O COME LET US ADORE HIM,
CHRIST, THE LORD!

ROCK OF AGES

Mighty, praise beyond compare,
Rock of my salvation,
Build again my house of prayer
For thy habitation!
Haste my restoration: let a ransomed nation
Joyful sing
To its king
Psalms of dedication!

Woe was mine in Egypt-land
Tyrant King's enslaved me,
Till thy mighty, outstretched hand
From oppression saved me.

Pharaoh, rash pursuing, vowed my swift undoing'
Soon, his host
That proud boast
'Neath the waves was rueing!

To thy holy hill, the way
Had'st Thou clear before me:
With false gods I went astray—
Foes to exile bore me.
Torn from all I cherished, almost had I perished;
Babylon fell,
Zerubabel
Had'st Thou to restore me!

Then the vengeful Haman wrought
Subtly to betray me;
In his snare himself he caught—
He that planned to slay me.
Haled form Esther's palace,
Hanged on his gallows!
Seal and king
Persl's king
Gave Thy servant zealous.

SILENT NIGHT

SILENT NIGHT, HOLYNIGHT,
ALL IS CALM, ALL IS BRIGHT.
ROUND YON VIRGIN, MOTHER AND CHILD,
HOLY INFANT, SO TENDER AND MILD.
SLEEP IN HEAVENLY PEACE.
SLEEP IN HEAVENLY PEACE.

SILENT NIGHT, HOLY NIGHT,
SHEPHERDS QUAKE AT THE SIGHT.
GLORIES STREAM FROM HEAVEN AFAR,
HEAVENLY HOSTS SING ALLELUIA.
CHRIST, THE SAVIOR IS BORN!
CHRIST, THE SAVIOR IS BORN!

O LITTLE TOWN OF BETHLEHEM

O LITTLE TOWN OF BETHLEHEM,
HOW STILL WE SEE THEE LIE.
ABOVE THY DEEP AND DREAMLESS SLEEP
THE SILENT STARS GO BY.
YET IN THY DARK STREETS SHINETH,
THE EVERLASTING LIGHT.
THE HOPES AND FEARS OF ALL THE YEARS
ARE MET IN THEE TONIGHT.

O HOLY CHILD OF BETHLEHEM,
DESCEND ON US WE PRAY.
CAST OUT OUR SIN AND ENTER IN,
BE BORN IN US TODAY.
WE HEAR THE CHRISTMAS ANGELS
THE GREAT GLAD TIDINGS TELL,
O COME TO US, ABIDE WITH US

JOY TO THE WORLD

JOY TO THE WORLD! THE LORD IS COME.
LET EARTH RECEIVE HER KING!
LET EVERY HEART, PREPARE HIM ROOM,
AND HEAVEN AND NATURE SING,
AND HEAVEN AND NATURE SING,
AND HEAVEN, AND HEAVEN AND NATURE SING.

JOY TO THE WORLD! THE SAVIOR REIGNS.
LET MEN THEIR SONGS EMPLOY.
WHILE FIELDS AND FLOODS,
ROCKS, HILLS AND PLAINS,
REPEAT THE SOUNDING JOY,
REPEAT THE SOUNDING JOY,
REPEAT, REPEAT THE SOUNDING JOY.

HE RULES THE WORLD, WITH TRUTH AND GRACE,
AND MAKES THE NATIONS PROVE,
THE GLO-RIES OF, HIS RIGHT-EOUSNESS,

AND WONDERS OF HIS LOVE,
AND WONDERS OF HIS LOVE,
AND WONDERS, AND WONDERS OF HIS LOVE.

WE THREE KINGS

WE THREE KINGS OF ORIENT ARE,
BEARING GIFTS, WE TRAVERSE AFAR.
FIELD AND FOUNTAIN, MOOR AND MOUNTAIN
FOLLOWING YONDER STAR.
O -- STAR OF WONDER, STAR OF NIGHT,
STAR WITH ROYAL BEAUTY BRIGHT.
WESTWARD LEADING, STILL PROCEEDING,
GUIDE US TO THY PERFECT LIGHT.

BORN A KING OF BETHLEHEM'S PLAIN,
GOLD I BRING TO CROWN HIM AGAIN.
KING FOREVER, CEASING NEVER,
OVER US ALL TO REIGN.
O -- STAR OF WONDER, STAR OF NIGHT,
STAR WITH ROYAL BEAUTY BRIGHT.
WESTWARD LEADING, STILL PROCEEDING,
GUIDE US TO THY PERFECT LIGHT.

GOD REST YE MERRY GENTLEMEN

GOD REST YE MERRY GENTLEMEN, LET NOTHING
YOU DISMAY.
REMEMBER CHRIST OUR SAVIOR WAS BORN ON
CHRISTMAS DAY.
TO SAVE POOR SOULS FROM SATAN'S POW'R
WHICH LONG HAD GONE ASTRAY.
OH TIDINGS OF COM-FORT AND JOY, COMFORT AND
JOY,
OH TIDINGS OF COM-FORT AND JOY.

FROM GOD OUR HEAVN'LY FA-THER, A BLESSED
ANGEL CAME:
AND UNTO CERTAIN SHEP-HERDS BROUGHT

TIDINGS OF THE SAME:
HOW THAT IN BETHLEHEM WAS BORN THE SON
OF GOD BY NAME.
OH TIDINGS OF COM-FORT AND JOY, COMFORT AND
JOY,
OH TIDINGS OF COMFORT AND JOY.

JINGLE BELLS

DASHING THRO' THE SNOW, IN A ONE HORSE
OPEN SLEIGH,
O'ER THE FIELDS WE GO, LAUGHING ALL
THE WAY.
BELLS ON BOBTAIL RING, MAKING SPIRITS
BRIGHT,
WHAT FUN IT IS TO RIDE AND SING A SLEIGH-
ING SONG TONIGHT! OH . . .
JINGLE BELLS! JINGLE BELLS! JINGLE ALL
THE WAY!
OH, WHAT FUN IT IS TO RIDE IN A ONE HORSE
OPEN SLEIGH!
JINGLE BELLS! JINGLE BELLS! JINGLE
ALL THE WAY!
OH, WHAT FUN IT IS TO RIDE IN A ONE
HORSE OPEN SLEIGH!

A DAY OR TWO AGO,
I THOUGHT I'D TAKE A RIDE,
AND SOON MISS FANNIE BRIGHT WAS
SEATED AT MY SIDE.
THE HORSE WAS LEAN AND LANK, MISFORTUNE
SEEM'D HIS LOT,
WE GOT INTO A DRIFTED BANK, AND WE
GOT UPSOT, OH . . .
JINGLE BELLS! JINGLE BELLS! JINGLE ALL
THE WAY!
OH, WHAT FUN IT IS TO RIDE IN A ONE HORSE
OPEN SLEIGH!
JINGLE BELLS! JINGLE BELLS! JINGLE

ALL THE WAY!
OH, WHAT FUN IT IS TO RIDE IN A ONE
HORSE OPEN SLEIGH!

HANUKAH

Hanukah, Hanukah, festival of lights;
Candles glow in a row, seven day, eight nights.
Hanukah, Hanukah, make your dreydls spin.
Round and round, round and round, everyone join in!

Hanukah, Hanukah, happy holiday,
Kindle light ev'ry night, Shamas leads the way.
Hanukah, Hanukah, games for ev'ry one,
Let's begin, who will win? Come and join the fun!

Hanukah, Hanukah, what a merry time;
Cakes to eat, what a treat, see the faces shine!
Hanukah, Hanukah, sing and dance this way!
Round and round, round and round, Happy holiday!

DECK THE HALLS

DECK THE HALLS WITH BOUGHS OF HOLLY,
FA LA LA LA LA LA LA LA LA.
'TIS THE SEASON TO BE JOLLY,
FA LA LA LA LA LA LA LA LA.
DON WE NOW OUR GAY APPAREL,
FA LA LA LA LA LA LA LA LA,
TROLL THE ANCIENT YULETIDE CAROL,
FA LA LA LA LA LA LA LA LA.

SEE THE BLAZING YULE BEFORE US,
FA LA LA LA LA LA LA LA LA,
STRIKE THE HARP AND JOIN THE CHORUS,
FA LA LA LA LA LA LA LA LA,
FOLLOW ME IN MERRY MEASURE,
FA LA LA LA LA LA LA LA LA,
WHILE I TELL OF YULETIDE TREASURE

FA LA LA LA LA LA LA LA LA.

FAST AWAY THE OLD YEAR PASSES,
FA LA LA LA LA LA LA LA LA,
HAIL THE NEW, YE LADS AND LASSES,
FA LA LA LA LA LA LA LA LA,
SING WE JOYOUS SONGS TOGETHER
FA LA LA LA LA LA LA LA LA,
HEEDLESS OF THE WIND AND WEATHER,
FA LA LA LA LA LA LA LA LA,

JOLLY OLD ST. NICHOLAS

JOLLY OLD ST. NICHOLAS,
LEAN YOUR EAR THIS WAY!
DON'T YOU TELL A SINGLE SOUL,
WHAT I'M GOING TO SAY,
CHRISTMAS EVE IS COMING SOON,
NOW MY DEAR OLD MAN,
WHISPER WHAT YOU'LL BRING TO ME,
TELL ME IF YOU CAN.

WHEN THE CLOCK IS STRIKING TWELVE
WHEN I'M FAST ASLEEP,
DOWN THE CHIMNEY BROAD AND BLACK
WITH YOUR PACK YOU'LL CREEP.
ALL THE STOCKINGS YOU WILL FIND,
HANGING IN A ROW;
MINE WILL BE THE SHORTEST ONE,
YOU'LL BE SURE TO KNOW.

O CHRISTMAS TREE

O CHRISTMAS TREE,
O CHRISTMAS TREE,
HOW LOVELY ARE YOUR BRANCHES,
O CHRISTMAS TREE,
O CHRISTMAS TREE,
HOW LOVELY ARE YOUR BRANCHES.

YOUR GREEN IN SUMMER-TIME YOU SHOW
AND ALSO IN THE WINTER SNOW.
O CHRISTMAS TREE,
O CHRISTMAS TREE,
HOW LOVELY ARE YOUR BRANCHES.

ANGELS WE HAVE HEARD ON HIGH

ANGELS WE HAVE HEARD ON HIGH,
SINGING SWEETLY O'ER THE PLAINS.
AND THE MOUNTAINS IN REPLY,
ECHOING THEIR JOYOUS STRAIN.

GLO-------RIA!
IN EXCELSIS DEO.
GLO-------RIA!
IN EXCELSIS DEO.

SHEPHERDS WHY THIS JUBILEE,
WHY YOUR JOYOUS STRAIN PROLONG?
WHAT THE GLADSOME TIDINGS BE,
WHICH INSPIRE YOUR HEAVENLY SONG?

GLO-------RIA!
IN EXCELSIS DEO.
GLO-------RIA!
IN EXCELSIS DEO.

COME TO BETHLEHEM AND SEE,
HIM WHOSE BIRTH THE ANGELS SING.
COME ADORE ON BENDED KNEE,
CHRIST THE LORD OUR NEWBORN KING.

GLO-------RIA!
IN EXCELSIS DEO.
GLO-------RIA!
IN EXCELSIS DEO.

RUDOLPH THE RED-NOSED REINDEER

RUDOLPH, THE RED-NOSED REINDEER,
HAD A VERY SHINY NOSE,
AND IF YOU EVER SAW IT,
YOU WOULD EVEN SAY IT GLOWS.

ALL OF THE OTHER REINDEER,
USED TO LAUGH AND CALL HIM NAMES,
THEY NEVER LET POOR RUDOLPH
JOIN IN ANY REINDEER GAMES.

THEN ONE STORMY CHRISTMAS EVE,
SANTA CAME TO SAY:
"RUDOLPH WITH YOUR NOSE SO BRIGHT
WON'T YOU GUIDE MY SLEIGH TONIGHT?"

THEN ALL THE REINDEER LOVED HIM
AND THEY SHOUTED OUT WITH GLEE:
"RUDOLPH THE RED-NOSED REINDEER,
YOU'LL GO DOWN IN HISTORY!"

FROSTY THE SNOWMAN

Frosty the snowman, was a jolly, happy soul,
With a corncob pipe, and a buttonnose,
and his eyes made out of coal.

Frosty the snowman, made the children laugh and play,
And were they surprised when before their eyes
He came to life one day.

There must have been some magic in that old silk hat they found,
For when they placed it on his head
He began to dance around, Oh-

Frosty the snowman was alive as he could be,
And the children say he could laugh and play

Just the same as you and me.

Frosty the snowman, the sun was hot that day,
So he said, "Let's run, and we'll have fun,
before I melt away."

Down to the village, with a broomstick in his hand,
Running here and there, all around the square, saying,
"Catch me if you can."

He led them down the streets of town right through a traffic cop,
And he only paused a moment when, he heard him holler "Stop!"

For Frosty the Snowman had to hurry on his way,
But he waved good-by saying, "Don't you cry, I'll be back again some day."

Thumpity-thump-thump, thumpity-thump-thump, look at Frosty go,
Thumpity-thump-thump,thumpity-thump-thump, ov-er hills of snow!

SANTA CLAUS IS COMIN' TO TOWN

YOU BETTER WATCH OUT, YOU BETTER NOT CRY,
BETTER NOT POUT, I'M TELLING YOU WHY
SANTA CLAUS IS COMIN' TO TOWN.

HE'S MAKING A LIST, AND CHECKING IT TWICE.
GONNA FIND OUT WHOSE NAUGHTY AND NICE,
SANTA CLAUS IS COMIN' TO TOWN.

HE SEES YOU WHEN YOU'RE SLEEPING,
HE KNOWS WHEN YOU'RE AWAKE,
HE KNOWS WHEN YOU'VE BEEN BAD OR GOOD,
SO BE GOOD FOR GOODNESS SAKE, OH!

YOU BETTER WATCH OUT, YOU BETTER NOT CRY.
BETTER NOT POUT, I'M TELLING YOU WHY.
SANTA CLAUS IS COMIN' TO TOWN!

November 20, 1982

Mayor Jean Stone
Village of Scarsdale
Scarsdale, New York

Dear Mrs. Stone:

I am a former resident of Scarsdale and I have returned many times over the years to visit friends, always retaining and reinforcing a sense of satisfaction for having once belonged in such a vital community. It is with a deep feeling of regret, therefore, that I must address a problem which has arisen in your village (and mine by extension) recently, and which is now threatening to disrupt the harmony and the quiet coexistence of citizens of varying religious persuasions.

At a recent dinner party in Scarsdale, conversation turned to a problem which has been permitted to acheive the status of a major issue—the placement of a creche at Boniface Circle during the Christmas season. The creche was a tradition during my growing up years in Scarsdale. It was not a cause of disharmony then because perhaps there was a greater sense of tolerance among all religious denominations. I numbered my friends among many faiths and joined in their celebrations as easily as they did in mine. As a matter of fact, we all learned from each other, without a formal ecumenism. The same sense of tolerance and freedom of expression cannot be allowed to vanish in the Scarsdale of today.

I bring up two point which I feel must be addressed by the Village Board when they convene to vote a decision on the traditional placement of the Creche:

I. If the issue is the use of public property for religious purposes, the decision to limit or deny that use must be applied universally. There is, at present, a Jewish congregation — Mivakshe Derekh — which has been using Wayside Cottage on a regular, weekly basis for its Sabbath services, and, on a more extensive basis, for its High Holy Day services in the fall. (This fact is published in the Inquirer in its religion section.) During the time when the facility is in use by this

group, *public access to the premises is restricted*. The full use of the property is denied to the public. Wayside Cottage is public property, owned by the village, but administered by the Junior League, a private organization which has been granted discretion as to the use of Wayside Cottage. Boniface Circle is public property as well and the Creche Committee is also a private organization. Public use of Boniface Circle is in *no way* restricted by the placement of the Creche. To deny the placement of the Creche by this private group would be to treat this private committee inequitably. This cannot be permitted and is subject to legal challenge.

II. If the issue is the separation of Church and State, as purported by Mr. Leonard Rubin, who created the issue in the first place, it would be wise for the Trustees of the Village to read carefully the section of our Federal Constitution prohibiting the establishment of a State religion. The Village has, in the past year, negotiated a contract with the employees of The Scarsdale Public Library which allows the closing of the library on Yom Kippur, a non-federal holiday. The library is a public facility and use of that facility is denied to taxpayers on that day. There is no other religious holy day for which that permission is granted. Christmas Day is a Federal holiday and that is the only day on which the library is closed for what can be construed as religious observance. The employees of the library were allowed to exchange library closing on Election Day, a federal and State observance. This cannot be permitted to continue if indeed there is to be a strict interpretation of Article I of our Constitution.

I sincerely regret that these points must be made public. It is the rancor which is threatening to erupt in your Village which has caused me to do so. I picked up a copy of this week's Inquirer with the purpose of trying to determine the position in the Village, removed from the sentiments of those who had initiated the discussion with me at dinner last week. It would appear that there is a wish on the part of concerned citizens to remove the status of "ISSUE" from the Creche. In its editorial, however, the Inquirer would prefer that the Creche Committee refrain from making its request and there-

fore make the problem disappear. This cannot be done in the spirit or the exercise of the first Amendment, without examining the other conflicts which exist in the Village, as stated above.

Had your administration addressed the issue firmly in the past, and resisted the exhortations of vocal malcontents, the free and tolerant practice of religious sentiment would not be an issue today. In the spirit of tolerance and fairness, the principle which is at stake must be judged without preference to one religious group over another. The effects of your decision will be far-reaching and not everyone will be pleased if the decision encompasses all the conflicts apparent. There is room for coexistence and an "ISSUE" would not have arisen had more tolerance prevailed several years ago among peoples who purport to bring civil rights to light.

Sincerely yours,

Dorothy S. Patterson

Copies to:
The Scarsdale Inquirer
The Creche Committee
The Trustees of The Village of Scarsdale
The Citizens' Advisory Council

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED IN PRINTING]

[McCreary Deposition excerpt]

go to any board meetings on that subject?

A No. I don't believe I did. Again, it seemed to be adequately handled.

Q The very next page of McCreary Exhibit B numbered 351 at the top, the next sentence on that page, "She replied that it was jointly owned by the group of residents asking permission to place it at Boniface Circle," was that a true statement?

A Well, it was actually owned by me, but we were—I was deeding title by oral deed to everyone who participated with me.

Q This was a creche that had been owned by you previous to December 7, 1982?

A That's correct.

Q How long had you owned this creche?

A Oh, for five years, something like that.

Q Did your purchase it?

A No. It was a gift from my husband's sister.

A During those four or five years, had you ever displayed the creche?

A Yes, I had.

Q On every year, every Christmas?

A Yes.

Q Did you display it in 1982?

A Yes.

Q And in 1981?

A Yes.

Q Where would you display it?

A It was inside my house in those times.

Q During the entire five-year period you had it?

A Yes.

Q Whereabouts inside your home?

A Oh, in the living room.
A In every one of those years?
A Let me think.
MR. MURPHY: If you remember.
A I'm not sure.
Q The majority of those five years?
A I think the majority. It might have been out in the hall one year.
Q Excuse me?
A I said it might have been in the hall one year. I don't recollect.
Q Was it ever displayed one year in the basement of your home?
A No.
Q How large is the creche?
A Twelve inches, the standing figures.

* * * * * *

A I didn't actually draft that, but the idea—
Q Was yours?
A —I believe was mine.
Q Referring to the fourth paragraph from the bottom, "The nativity scene should not be a divisive issue but the Board has unfortunately made it so," did you agree with that statement?
A Yes.
Q Do you still consider the issue to be a divisive issue?
MR. MURPHY: What do you mean by divisive issue?
MR. LANDMAN: However it's meant in the December 18, 1982 open letter advertisement.

A I think it remains a troublesome issue, a vexing issue of constitutional construction that should be solved.
Q Is it also a divisive issue, still?
MR. MURPHY: As used in this document?
MR. LANDMAN: As used.

A To the extent that people disagree as to whether there is or is not a constitutional right, then it remains an issue.

Q Would you agree that it is still a divisive issue, as used in this document?
MR. MURPHY: She just answered that question.
MR. LANDMAN: No, she did not.
MR. MURPHY: She didn't? Would you read back the question before, the question just before this question?
MR. LANDMAN: And the answer.
(A portion of the record was read by the reporter.)
MR. LANDMAN: I asked whether it is still a divisive issue, and if you listened to what the reporter just read, the answer was, it is still an issue.
My question is whether it is a divisive issue, still.
MR. MURPHY: For purposes of the record, I think she has answered that question.
Mr. LANDMAN: Fine.

Q Mrs. McCreary, is it still a divisive issue in the context of divisive as used in McCreary Deposition Exhibit C?
A I believe that I said that my definition of, my understanding of divisive in this letter was that it was a troublesome issue because it related to a constitutional question of considerable significance—with respect to which some people disagree. That's my definition of divisive, and in that respect, obviously, it is still a divisive issue or I wouldn't be in this room.

* * * * * *

Q Did he ever say to you he wished the whole affair would just go away?
A No. I think he was apprehensive about litigation.
Q How about Ms. Lenz?
A She, too, felt that she was not in a position to become involved in litigation. There was another individual I remember, Collette Hoey, who stated that she simply did not want to sue the Village.
Q H-o-e-y?
A H-o-e-y.
Q Did any of these individuals say they did not agree with the position that was being put forth in this lawsuit?

A No.

Q Are there any other individuals you can now recall that you spoke with that said that or refused to be Plaintiffs?

A No.

Q What message does the creche symbolize to you?

A To me it has a variety of meanings. It is a celebration of a specific historical event, of the birth of an individual in whose divinity I believe. It is also to me an expression of moral and philosophical and spiritual values that would relate to a kind of secular humanism. I might say I think both are of equal significance.

Q Would you consider the Fourth of July to be a similar celebration of an historical event?

MR. MURPHY: Just note my objection to the form of the question. You may answer it.

Q You may answer it.

A Yes, I think the Fourth of July is.

Q How about Abraham Lincoln's birthday?

A Yes.

Q Do you believe the Village of Scarsdale should have any role in celebrating the birth of Christ?

MR. MURPHY: Note my objection to that question.

A The Village of Scarsdale, No. Repeat the question.

Q Sure.

MR. LANDMAN: Would you read it back?

(The pending question was read by the reporter.)

MR. MURPHY: Should the Village of Scarsdale have a role in celebrating the birth of Christ, I believe is the question.

A No.

Q Why is that?

A Because I believe the proper role of the Village is to—well, the proper role of the Village is to facilitate the private celebration thereof to the extent it has religious significance. To the extent Christmas has assumed a secular meaning, then I do believe that its erection of trees and lights and carols is appropriate.

Q For secular reasons?

A Yes.

Q Do you believe that the Village's role in erecting Christmas trees and lights and caroling is a secular role?

MR. MURPHY: Note my objection.

A Primarily, I believe so.

Q Mrs. McCreary, I believe you read the Complaint before it was filed in this action?

A Yes.

Q Is that correct?

A Yes.

Q Did you agree with everything in the Complaint?

A Most things, I believe, yes.

Q I would like to show you a copy of the Complaint in this action and just ask you if there is anything—and you can take as long as you want—if there is anything that comes to mind—if you want to look at any portion of it—with which you disagree.

MR. MURPHY: Can you be a little more specific?

MR. LANDMAN: Well, I can be very specific. I think that Mrs. McCreary's answer was that most of the things

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celebration and message of the christmas holiday,'' what does that mean to you?

A Well, it means several things. The celebration of Christmas for Christians is a religious event, and the application to erect the creche, as I said in my application, is for the purpose of celebrating our personal religious convictions and having access to parklands open to all others for that purpose. I mean for general purposes.

With respect to the celebration, as I've indicated, to me there is also a humanistic, secular aspect that conveys an important message of peace and good will (you can perceive the message is in the eye of the beholder) but I think that's an additional message that was intended to be conveyed, an ecumenical message.

Q By the erection of the creche?

A Yes.

Q Is the purpose of the creche, then, for a religious or a secular purpose?

MR. MURPHY: In her opinion.

A In my opinion, it's both.

Q Which is the dominant purpose?

A To me, neither one dominates.

Q They are equal?

A They are both equal.

* * * * * *

A Do I think it's appropriate for the government to erect a Christmas tree? Yes, because I believe holidays are—it is appropriate for the government to commemorate holidays both—whether they are religious in origin or not and whether they remain so or not.

Q Do you think the government should commemorate every religious holiday?

MR. MURPHY: Same objection.

A I think you are misquoting me. I said I thought it was appropriate for the government to commemorate holidays even though they may have a religious origin and may in some peoples' minds remain religious. I believe I should add, that to the extent that the holiday has a variety of meanings to a variety of people and there is a general universal symbol of the holiday as such, that it is not constitutionally impermissible for the government to celebrate that holiday by various symbols and signs.

Q Are there any other religious holidays which you feel the government should celebrate?

A Well, the Scarsdale schools are closed on Rosh Hashanah and Yom Kippur. I feel that's appropriate. The Scarsdale Children's Library of the Scarsdale Public Library has erected a menorah at Hanukkah. Similarly, the Scarsdale public school, in the library, has erected five menorahs during Hanukkah. I find that all appropriate. It does not offend me. Yes, I believe that's acceptable.

Q Why do you draw a distinction for the creche?

MR. MURPHY: Who said she did?

A To me these have no religious significance, they are commemorating—these are a symbol which have to do—let's see, which have to me a secular meaning, but to other people a religious meaning. I don't subscribe to the religious meaning thereof, but to me they have, again, spiritual, ethical, humanistic, moral values. I have no objection to their erection. No one is forcing me to believe in anything.

Q Now that you've had an opportunity to think about these other symbols, have you formulated an opinion as to whether or not you think it is appropriate for the erection of a creche at Boniface Circle?

MR. MURPHY: Excuse me. You are going to have to be a little more specific. That's exactly what she proposed to do in December.

Q For the Village to erect a creche at Boniface Circle?

MR. MURPHY: At government expense?

MR. LANDMAN: Yes.

A At government expense? I still don't know.

Q I would like to refer you to paragraph 18 which is found on page 9 of the Complaint.

MR. MURPHY: Paragraph 18?

MR. LANDMAN: Yes.

Q In the context of the last sentence of that paragraph, what is your understanding of the phrase, "The Plaintiffs also represent in this application that among the purposes of the display of the creche are their desires to join in the Village's celebration of Christmas by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions"?

Q What is meant by celebrating or joining in the Village's celebration?

A I'm sorry. I thought I expressed that. In other words, I think the Village takes recognition, as I said, of the federal, national holiday of Christmas. I think it takes recognition of the fact that there is a holiday which is widely celebrated by people of all faiths and all persuasions, atheists included, that pursuant thereto, they erect various multi-colored lights, whatever. They mean one thing to me, they mean another thing to

someone else, and my part in all of this hoopla is to express my own religious convictions because that is the part of Christmas that's important to me. I hope—

MR. MURPHY: That's a very good answer.

Q Is there a feeling on your part that one of the purposes of having the creche at Boniface Circle is to prevent Christmas in the Village of Scarsdale from becoming too secularized?

A No.

Q That is not—

Mr. MURPHY: She said no.

A No.

Q Do you consider that Scarsdale's, the Village of Scarsdale's celebration of Christmas is too secularized?

A No.

Q Would your describe to me what is located in Boniface Circle?

A Two park benches, a flagpole, a tree, a walkway through, a walkway around, hedges, grass, and then kind of down in a declevity of sorts, I think it's the north end, there is a small stone half circle or quarter circle which has various plaques on it, and I think—Boniface Circle existed, of course, from the beginning of the Village's history, and I believe it was after World War II that this—

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because you have to walk downstairs. You don't see them, the plaques, very readily, easily.

Q Did you belong to any group that erected a creche in any year anywhere in Scarsdale previous to this?

A No.

Q Do you believe the creche should be at Boniface Circle rather than other publicly owned land?

MR. MURPHY: Just note my objection to the question.

A I think it's a good spot for the creche.

Q Are there other good spots for the creche?

MR. MURPHY: Where?

Q In the Village of Scarsdale on publicly owned land.

A I think Boniface Circle is probably the best spot.

Q Why?

A Because it is very central.

Q Any other reasons?

A Well, because the lights are primarily concentrated in that immediate downtown area, which is not large, and there is the Christmas tree that is decorated and the lights, and it just belongs—if you're goinig to put up—it belongs as part of that display. The other parks do not have the lights and the wreaths and all that stuff.

Q Do you know where Chase Park is?

A Yes.

Q Across the street from Boniface Circle?

A Across the street, yes.

Q Did you ever consider that as a place to put the creche?

A I did not.

Q Why not?

A It has a great—it has a lot of trees and it kind of floats upward and it's—to my knowledge, there are no Christmas decorations in that park at all. It's dark and secluded.

Q Has anyone ever said to you that they believe the creche should be at Boniface Circle because there are the names of the veterans in Boniface Circle?

A No.

Q Have you every thought that?

A No, I've never connected that.

Q Have you ever heard the two of those connected?

A No.

Q Did you consider any other publicly owned land for location of the creche prior to filing the December 7, 1982 application?

A No.

Q Did anyone raise that with you?

A No.

Q And the reasons are for the reasons you have previously stated?

A Right, that there's no other publicly owned lands that are decorated.

Q Do they decorate the Village Hall?

A There's a tree inside and I think on the roof, but that's all the decoration that is there, I believe.

Q Would that be an appropriate place for the erection of a creche?

A You could—possible. It is isolated, comparatively.

Q Mrs. McCreary, do you believe that the creche should either be at Boniface Circle and nowhere else?

MR. MURPHY: Objection to that question. When you say "nowhere else," do you mean public, private, homes?

Q Anywhere.

A Anywhere?

Q Yes, in the Village of Scarsdale.

A Do I believe the creche should be at Boniface Circle and nowhere else or rather than anywhere else?

Q Or nowhere else.

MR. MURPHY: Either/or. Just note my objection to the question.

A I'm still confused. Are you asking me do I think that—

MR. MURPHY: Let him rephrase the question.

Q Mrs. McCreary, is it your belief that the creche should either be at Boniface Circle or not erected in the Village of Scarsdale, the creche which you own?

MR. MURPHY: Obviously not. She testified she erected it in her own home.

A No.

Q Do you believe it should be on Boniface Circle or not be placed outside?

MR. MURPHY: Note my objection.

A No.

Q You do not believe that?

MR. MURPHY: She does not. Her answer was no.

Q Do you believe that it should either be at Boniface Circle or no other publicly owned land?

A No.

Q You think if it cannot be at Boniface Circle, then it might be appropriate to put it in a different location in the Village of Scarsdale on publicly owned land?

MR. MURPHY: I'm asking counsel if when he uses the word "appropriate," does he mean legally permissible.

MR. LANDMAN: Legally or morally.

MR. MURPHY: I don't understand what morally means, and I object to the form of the question.

MR. LANDMAN: I'm asking Mrs. McCreary's view of morally appropriate.

A To place it on any other public land other than—

Q Boniface Circle.

A Yes, I think it could go elsewhere, but I think Boniface Circle is the best location.

MR. MURPHY: You don't or you do?

THE WITNESS: I do think Boniface Circle is the best location.

Q But if it could not be at Boniface Circle, you would not object to having it at a different location of publicly owned land?

MR. MURPHY: Objection.

A I didn't say that.

Q I'm asking that now.

A I would not object? That I don't know. I would have to wait and see.

Q Wait until you see how this lawsuit comes out? Did you ever consider, other than within your own home, placing the creche on private property once the Board of Trustees rejected your application for Boniface Circle?

A No, I did not.

* * * * * *

Q Would you tell me, in addition to the Christmas tree, Christmas decorations, Christmas lights, how else the Village of Scarsdale celebrates Christmas, from your own knowledge?

A Oh, the Christmas tree and Christmas lights both at City Hall and in the Village? Well, it issues permits to the Town Club to have a Christmas carol sing. It erects lights at Arthur Manor. It lets its fire trucks be used for Santa Claus to go to the various neighborhood associations, Christmas carol sings, closes the public schools.

Q Do you consider each one of those things to have both a religious and a secular purpose?

A Probably the Santa Claus is wholly secular, I suspect, although not necessarily. Again, it depends.

Q In your opinion.

A In my opinion, all of these activities are inextricably involved in the celebration of the whole season which has two but co-equal significances for me.

Q Does your religion require you to erect a creche—

A No.

Q —on publicly owned land?

A No.

Q What is your understanding of the purpose of the plaque or sign that would be placed on the creche that you plan to erect?

A The purpose is to make clear that the Village of Scarsdale does not explicitly or implicitly endorse the communicative concept of this display; it is neutral with respect to the issue.

Q Do you think that's necessary?

MR. MURPHY: Legally?

MR. LANDMAN: In her own opinion, whether it's necessary legally or—

A I think it's an appropriate gesture.

Q Why?

A Because I think it's—although I believe I have the constitutional right to erect the creche, I am perfectly willing to accommodate other individuals and take whatever steps are appropriate to assure them that there is no impermissible government involvement. I think it's a question of reassuring those people in the community who might take exception to it as a gesture of good will.

Q Do you think erection of the creche without the sign would be permissible on publicly owned land?

A Yes, I do, probably. If there's a constitutional right to erect it, I think sign or no sign, you can erect it.

Q Why do you prefer to have the creche erected on publicly owned land versus privately owned land?

A I think there is a constitutional right to have it there, free exercise of my own religion and free speech.

Q Any other reason?

A Pretty much that.

Q Nothing else comes to mind now?

A No.

Q Have you ever seen any other religious symbol or structure on Boniface Circle other than the creche, the Christmas lights and the Christmas tree?

A On Boniface Circle? No. Your question was religious?

Q Religious.

A No, not that I can recollect.

Q I think we've identified a couple of holidays, and correct me if I'm wrong, that the Village celebrates, and they include Memorial Day, July Fourth and Christmas. Are there any others that come to mind?

MR. MURPHY: I think she testified previously about several Jewish holidays.

A The schools are closed for Yom Kippur, Rosh Hashannah. The library is closed for one day of Rosh Hashannah and the public employees are given paid holidays for both Good Friday and Passover. Easter is also a Sunday, so they are closed. I know the schools are closed those

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A The commentary.

Q Could you read it out loud?

MR. MURPHY: The whole thing?

MR. LANDMAN: Let's go for a while and see what it says.

A Do you want me to read—

Q Everything.

A —everything?

Q To the extent you can.

A Even the scratch-outs or do you want me to read for sense?

Q Just read everything.

A I have to jump around to tell you what it means. If I read them out of order, it's not going to make any sense. Why don't you let me read it first?

Q Fine.

A Let me read it for sense first.

"Mayor Stone's recent statement that the creche controversy was the most tragic aspect of her political tenure expresses a sentiment shared by all involved in this most unfortunate dispute. This tragedy, however, has been largely self-inflicted by the Mayor and her similar minded Trustees."

Jumping to No. 3 now. "Across the nation in

* * * * * * *

Q Who on this list is Jewish?

A Drapkin.

Q D-r-a-p-k-i-n?

A Yes.

Q What does it say after that where you say "all different"?

A "All neighborhoods," and then, "They represent all of Scarsdale neighborhoods."

Q "And then underneath that at the very bottom?

A "Help from Lord, Day & Lord, Gilmour, DeSousa."

Q I think the record is going to be confused. If you start where it says "Gilmore"—

A "Gilmore" and then there's a "plus DeSousa, help from Lord, Day & Lord."

Q Who is DeSousa?

A He's a private practitioner.

Q And his name is spelled D-e-S-o-u-s-a?

A D-e-S-o-u-s-a. He originally felt he could not be a plaintiff, by the way.

Q Why is that?

A Because of his association, because of his volunteer activity for the Archdiocesse, he thought it might be a conflict.

Q Has the Archdiocese taken a position on this

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED IN PRINTING]

[Curran Deposition Excerpt]

Q Have you ever sought approval from any other governmental body other than the Scarsdale Village Board of Trustees for erection of a creche?

A No.

Q In every year that you have sought permission to erect a creche, have you always sought permission to erect it at Boniface Circle?

A In every year that we have applied to the village board, yes, it has always been for the purpose of placing it on Boniface Circle.

Q For what reason was Boniface Circle chosen?

A Initially in 1956, 1957, the Christmas carol sing in Scarsdale was held at Boniface Circle, and it was at this time that a group of people decided that it might be a good idea to possibly purchase a creche and have it placed at this site every year, the site of the Christmas carol sing, and that's how that spot was initially chosen.

Q Have you ever considered any other piece of property in Scarsdale for erection of the creche in any year since 19—I guess 1971 would be the first year you were on the committee?

A No, 1973. I have been a member of the committee for ten years. I have been a member—I've lived in Scarsdale twelve, but a member of my committee since 1973.

Have we ever considered or—

Q [illegible] applied for any other other property since 1973 other than Boniface Circle?

A Yes, we have. The year that we first spoke to Mrs. Clark and her Human Relations Committee, 1980, I believe that was, we agreed that if the Frog Prince Restaurant could be obtained for the creche, we would be happy to place it there,

and the savings bank on the corner of Popham and Chase. I believe. It's not Hanover. It's Manhattan Savings, I believe. We agreed on both, those two sites.

In addition, in 1982, after we had a meeting with Mayor Stone and Mr. Tooley, and representatives from the Chamber of Commerce, representatives from the police force, all of the representatives from the Creche Committee, including their pastors and ministers, the representatives from the Human Relations, all of the present trustees and the newly-elected trustees, we had a meeting with them in the firehouse and we all agreed to the concept of Heritage Plaza, which was a piece of land, a part of Chase Park, and the idea was to take this parcel of land and make it private property for the purpose of erecting a creche, for folk dancing, for all types of displays, for whatever groups in the village would feel they could use it for.

I think those were the three sites. There was a fourth site that we did not know about that Mrs. Clark and her committee pursued in 1980, also, and that was the round circular piece of land on the southbound side of the New York Central. We would have been very happy to place the creche on this piece of land. The topography of the land is very similar to Boniface Circle, but that piece of property did not work out also.

MR. SCHWARTZ: Excuse me. You said in the course of your answer that the idea was—and then I will paraphrase your answer—to create private property out of a piece of Heritage Park.

Whose idea was that?

THE WITNESS: That was, interestingly enough, expressed at this meeting with all of these people, by both sides, by the Creche Committee and by members of the village board almost simultaneously. We, I think, had more or less been thinking in terms of this, and to say who verbalized it first, I don't know, but it just was almost a simultaneous suggestion.

Q This fourth site that you have just described, I think you said is to the south side of the New York Central, am I correct?

MR. SCHWARTZ: Southbound track.

A Southbound track, yes, it's an oval, circular piece of land.

Q Does that have a name, is that Depot Plaza?

A Depot Plaza is the name of the spot, yes.

Q Is that owned by the Village of Scarsdale?

A Well, that was the problem. Part of it was owned by the railroad, and very happily they were willing to have the creche put on this piece of land, but when Mrs. Clark and her committed pursued it, it was discovered that the greater portion of the property was owned by the village.

Q Did you have any discussions with the village about that piece of land?

A Mrs. Clark, the Chairman of the Advisory Council, told me Depot Plaza was unavailable because most of the property was village-owned land. We did not discuss Depot Plaza later with the Village Board.

Q I take it you were in favor of the Heritage Plaza proposal?

A Absolutely.

Q Now, I believe in 1980 you said that there was a discussion about placing the creche at the Frog Prince Restaurant?

A That was one of the sites that was suggested to our committee, yes.

Q As well as Manufacturers Trust?

A That's right.

Q Who made those suggestions?

A That suggestion was made by—at the meeting of the members of the Creche Committee, and the Human Relations Committee. In discussing possible sites throughout Scarsdale, this was the two pieces of property that both committees agreed on. As to whom suggested each site first or initially, I really don't remember.

Q And were you in favor of either of those sites being used for erection of the creche?

A Yes, we were. When we left that meeting, it was understood that if they could be obtained, that we would get

back to the rest of our committee and be happy to place the creche at either of those sites.

Q Am I correct, then, that it is not the position of the Scarsdale Creche Committee that the creche has to be erected on publicly-owned land?

A Are you speaking of the present moment?

Q Let's take 1980.

A Obviously in 1980 it was not the position of the Creche Committee that it had to be on publicly-owned land.

Q And that would be true in 1982 as well, I take it, based on the railroad property that was mentioned?

A The railroad property was also looked into in 1980.

Q I see. And again was it also looked into again in 1982 or was that entirely in 1980?

A That was strictly in 1980.

Q How about in 1981, what was the position of the Scarsdale Creche Committee with regard to whether or not the creche had to be on publicly-owned land?

A In 1981, we reapplied for permission and we were denied permission, and in that year, the creche was placed at the Frog Prince Restaurant.

Q Was that a satisfactory result for the year 1981?

A It was not satisfactory in the sense that we were denied permission, but it was satisfactory to the members of the committee in view of the fact that one of the pastors of—my pastor in my church received a great number of phone calls from elderly people expressing disappointment that the creche would perhaps not be displayed anywhere, and asked him to use his influence and to see if we could—if the committee would be willint to place it at the Frog Prince Restaurant property.

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creche on the Congregational Church property or on the Baptist Church property, which I also received an offer for, or not to put it up at all. And the committee decided not to put the creche up in 1982.

Q Did any members of the committee voice the fact that they were in favor of erecting it at Scarsdale Congregational Church?

A No.

Q Or the Baptist Church?

A No.

Q So the decision not to accept either of those offers was unanimous?

A Yes.

Q What reason did the committee have for not wanting to accept the offer of the Scarsdale Congregational Church?

A The reasons why we would not put the creche at the Congregational Church are several. I think probably the most important one is that the topography of the land is totally unsuitable to place this creche. From an engineering standpoint, it could not be done.

Q Did you have any discussions with any engineers about that?

A We did not.

Q Who drew that conclusion?

A Well, the conclusion was drawn because we had for 25 years put together this creche and know what type of a piece of land it must have in order to be displayed, and—

Q How about the Baptist Church?

A The Baptist Church land, in our opinion, is most unsuitable. The front of the church that faces on Popham Road is filled with bushes. Obviously you cannot place a creche there.

The other side, where they have a driveway, a very small piece of grass and then some concrete, is also unsuitable simply because it is a driveway, part of their parking lot, and the small piece of land is behind a hedge, which is probably about three feet high.

Perhaps the Baptist Church felt that we would want to place it on the other side of the church, which is, to my mind, a side street, and—

Q What is the name of that street?

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A Is that Authenreith? It could possibly be the end of Authenreith. I'm not too sure.

There is a very small grass plot in there, but that—it would never be seen.

Q What was the reason for not asking the Frog Prince Restaurant as to whether or not the creche could be erected there?

A We chose not to put the creche back on the Frog Prince property because the one year that we did place it there it was removed and damaged.

MR. SCHWARTZ: That is, removed by vandals?

THE WITNESS: That is correct.

Q The Frog Prince Restaurant is across the street from Boniface Circle?

A Yes.

Q When you submitted your application in 1982 to the village board of trustees, did you specifically ask for permission to erect the creche at Boniface Circle, or did you ask for other publicly-owned land in the village?

A We asked for Boniface Circle.

Q Was there any discussion among the committee members toward a view of asking with regard to other publicly-owned land other than Boniface Circle?

A No.

Q Has there ever been any such discussion with regard to publicly-owned land?

MR. SCHWARTZ: In 1983?

MR. LANDMAN: No, every since Mrs. Curran has been on the committee.

MR. SCHWARTZ: She has already testified.

MR. LANDMAN: I believe that the testimony previously has been about privately-owned land except with regard to the portion of Depot Plaza that is owned by the village.

MR. SCHWARTZ: And Heritage Plaza.

A Heritage Plaza is the only piece of publicly-owned land.

Q Now, directing your attention to Curran Deposition Exhibit A, the last paragraph. Certainly feel free to read the entire paragraph. I'm referring to the second and third lines:

"We make this offer in the interest of helping to heal this community by providing a privately-owned publicly convenient vantage point," et cetera.

Did you have an understanding after you received this letter from Mr. Kimball as to what was meant by the phrase "in the interest of helping to heal this community"?

A No. To heal this community.

Q Did you know what he was referring to?

A Well, obviously he felt a need of the community being healed in some manner, but, no.

Q Did you every discuss that with Mr. Kimball?

A No.

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of the bringing of this lawsuit, other than the representative of St. James the Less?

A No. Everybody was agreeable.

Q What message does the creche symbolize the you?

A It symbolizes peace on earth and good will to men.

Q Anything else?

A Are you referring to my specific creche?

Q Yes. When you say your specific creche, I mean the creche that is part of the village—I'm sorry, the Scarsdale Creche Committee creche.

A How I view it?

Q Yes.

MS. GOODMAN: Could we go off the record for a second?

MR. LANDMAN: Yes.

(Pause.)

MR. LANDMAN. On the record.

A I also view the creche as a beautiful piece of art.

Q Does it also recognize in your view the birth of Christ?

A Yes.

Q Does it have a religious meaning to you, the creche?

A A religious meaning? It speaks of the historical religious event of the birth of Christ, yes.

Q Does it also have a secular meaning to you?

A Yes, I would say so.

Q And that would be the peace on earth, good will toward men?

A Yes.

Q Anything else?

A I think it speaks of tranquility, tolerance and love.

Q Is it the purpose of the Scarsdale Creche Committee to express that to any group?

MR. LANDMAN: "That" being what?

Q The peace on earth, good will to men as well as the recognition of the birth of Christ, to any groups or individuals in the Village of Scarsdale?

A I think you've asked the question—we have established that one has a religious significance and the other is a secular, and if I could perhaps answer each question.

Q Separately?

A Separately.

Q Sure. Let's take the religious first.

A So the question would read?

Q The question would be, does—it is the purpose of Scarsdale Creche Committee to recognize the birth of Christ in part by expressing a message to individuals or groups within the Village of Scarsdale?

A I would say that we are expressing the message of the birth of Christ to all people who pass by, to no specific group. We exclude no one.

Q Any and all people that pass by?

A Any and all people that pass by and view it.

Q Pass by Boniface Circle?

A Yes, and my answer to the expression of it representing peace and good will and tolerance, absolutely we would want to express that to all people, also.

Q Does the Village of Scarsdale play a role in celebrating the birth of Christ?

A I would say yes. The entire business community in Scarsdale is beautifully decorated with Christmas wreaths and

on each wreath is a sprig of lights. The Town Club has permission to conduct a carol sing and that's a very festive time.

MR. SCHWARTZ: Where is the carol sing?

THE WITNESS: The carol sing this past year was on Boniface Circle, and the Christmas tree—the tree on Boniface Circle was lit with Christmas lights.

Q Is that always the practice in the Village of Scarsdale to the extent you can recall?

A No. The carol singing has not been on Boniface Circle for many years. It originally started at Boniface Circle, and this was how the Creche Committee was born, when people stood on Boniface Circle to sing the Christmas carols and holiday songs, a group of people thought it might be a nice idea to erect a creche on this piece of property while the singing was going on and that was the original beginnings in 1956, 1957.

When the new Village Hall was built, the carol sing was held in front of the Village Hall up until this year when it was brought back to Boniface Circle.

Q How long does the carol sing last?

A I really don't know.

Q More than two hours?

A I really can't tell you.

Q Does it last more than a day, is it a two-day performance?

A No. It take place within one day.

Q Going back, I believe you testified that in 1980 the Frog Prince Restaurant was offered to the Creche Committee as a site available for erection of the creche, is that correct?

A That was the year we placed it on—

Q No, 1981 was the year, and it could be that you might have just been confused on the years, and I just wanted to clarify that.

A No—

Q In 1980, the creche was placed at Boniface Circle. The question is whether or not in 1980 the Frog Prince Restaurant

had been made available for consideration by the Creche Committee to place the creche.

A No, it wasn't.

Q The first time it was available was the year that it was utilized?

A The year that it was utilized, that's correct.

Q Why did the Creche Committee apply for permission to use Boniface Circle, to the Board of Trustees?

A Why do we do that?

Q Yes.

A Because to our knowledge it is the only way that we could over the years legally place such a symbol on public property.

Q Did you consider applying to the Village Manager for permission?

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To me, I can see religious significance in wreaths.

Q How about carolling, is that part of a religious custom or practice for you?

A Oh, yes.

Q And that would include the Town Club's carolling?

A Yes.

Q Does your religion command that a creche be erected?

A No, it does not.

Q Do you know of any religion that does make such a commandment?

A No.

Q The American flag that's in Boniface Circle, I assume that flies approximately every day?

A I would assume the same thing, yes.

Q Do you know who owns that American flag?

A No.

Q Do you know who puts it up?

A Yes, I believe it's a member of the police department.

Q And I assume they take it down at the end of the day?

A And, yes, I have seen them putting it up and taking it down.

Q Would that lead you to believe that it's probably the village's flag?

A Not necessarily. It could be—the flag could possibly be put up by whoever was on duty in town, so to speak, whether it be a merchant or someone from the post office or someone from the police force. I really don't wish to assume as to the ownership of the flag.

Q Would you participate in the erection of the creche every year at Boniface Circle?

A Yes.

Q How far was the creche erected from the war memorial, would you estimate?

A I am a very poor judge of distance. I do better with a ruler. Quite a distance from the war memorial. It's basically on the other side, close to the sidewalk, the other side of Boniface Circle.

Q So the creche can be observed from Chase Road?

A Yes.

Q Can it be observed while driving by in a car on Chase Road?

A It can be seen, but it's not overly noticeable.

Q But there's no obstruction between the creche and Chase Road?

A In front of the creche, no. Facing the creche on my right-hand side where that huge tree is, if you were approaching the creche from that side, you possibly would not get too good a view of it, because that huge tree would interfere. You really have to be facing it directly in order to see it.

Q Since 1977, have you placed a sign at the creche every year in which it's been erected at Boniface Circle?

A I don't recall the year. We have placed a sign on the creche every year since the village trustees required us to do so.

Q Is that sign able to be observed while riding in a car on Chase Road?

A The creche itself was not meant to be observed while riding in a car. It was meant to be observed by people passing

by on the sidewalk. Therefore, I would say the sign is able to be read by people passing by on the sidewalk.

Q But not in a vehicle?

A I have never tried it, so I couldn't really say. If I were a passenger in a car, perhaps I might read it, but I doubt if I would if I were driving.

Q If you are a passenger in a car, can you see the sign easier or can you see the creche easier from Chase Road?

A You can see the creche.

MR. LANDMAN: I would like to have marked as Curran Deposition Exhibit C a sign which has been produced to us by the plaintiffs which we will ask the witness to identify.

(Sign marked Curran Deposition Exhibit C for identification, as of this date.)

Q I show you, Mr. Curran, what the reporter has marked as Curran Deposition Exhibit C and ask you if that is the sign that has been erected—

A That is the sign that was on the creche.

Q As far as the size of the sign, was that something dictated by the Board of Trustees or was that chosen by the Scarsdale Creche Committee?

A When the Board of Trustees asked us to place a sign on the creche, the only stipulation they made was the wording of the sign.

Q And the size was selected by the committee?

A The size was selected by the committee, but I would like to mention that this sign is larger than the initial sign that we placed there.

Q How long was the initial sign placed there, how many years?

A I would say a year.

Q Then this sign replaced it?

A Then this sign replaced it.

Q Were the same types of letters used on the initial sign?

A Yes.

Q So the letters themselves were the same size?

A The same type of letters was used. I do not know whether the letters themselves were the same size. If anything, these letters would be larger.

MR. SCHWARTZ: The current sign?

THE WITNESS: Yes, the current sign. The current letters would be larger than the original.

Q Have you ever heard anyone on the committee say that Boniface Circle has the war memorial, that is where the creche should be as opposed to other publicly-owned land?

A No.

Q Would you agree with that statement?

A No. There is no relationship between the creche and the war memorial.

Q Have you ever heard anyone mention that relationship?

A No.

Q Have you ever seen any structures at Boniface Circle that were erected by a private group or individual other than the creche?

A I have never personally seen any, no.

Q Am I correct that it would not be the position of your committee that the creche should be at Boniface Circle or nowhere else?

A Would you repeat that?

Q Sure.

Am I correct that it is not the position of your committee that the creche should be at Boniface Circle or not erected?

A I find too many negatives in that sentence.

Q Fine. Is it the position of your committee that the creche should be at Boniface Circle or not erected?

A It is the position of my committee that the creche should be at Boniface Circle.

Q And if it cannot be at Boniface Circle, it should not be utilized?

MR. SCHWARTZ: That's a hypothetical question. It has not arisen yet for 1983. You can ask her what things she would prefer and if she knows how to answer it, she may.

A I would rather not say what I prefer for 1983.

Q That was the position in 1982, though?

A The position in 1982 was that we were not going to erect the creche, and that we would meet to decide the future of the Creche Committee, the future of the Creche Committee up to date is this lawsuit.

Q And there have been no discussions with regard to 1983 in case for some reason a decision is made that Boniface Circle may not be utilized?

A We have learned not to speculate as to the future.

Q I take it your organization does have insurance on the creche?

A Yes.

Q Is that liability insurance?

A We have produced to the Village board when asked to do so evidence of insurance.

Q Do you know of any other private use of Boniface Circle?

MR. SCHWARTZ: Other than she has testified to?

MR. LANDMAN: Yes.

A By a group?

Q Yes.

A By a legitimate group of some kind?

Q Any group.

A No.

Q How about private individuals.

A Well, Boniface Circle is used by individual citizens.

Q As a park?

A As a park. It serves to my mind as a tremendous haven to pedestrians and shoppers. It's right in the middle of the business district, and the expansive street there would be dangerous unless we had that little haven right in the middle.

Q Now, you have gone to board meetings at which the creche was discussed, is that correct?

A Yes, that is correct.

Q Have you ever gone to any board meetings where the creche was not discussed?

A I believe I have gone to two.

Q Where the creche was not discussed?

A Where the creche was not discussed.

Q For what purpose did you go to those meetings?

A I don't recall.

Q At those meetings, were there more people in attendance than at the December 1982 meeting at which the creche was discussed?

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the Scarsdale Creche Committee group and I did not want to increase the confusion.

Q Are you aware of the fact that the Human Rights—I'm sorry—Human Relations Council has recommended that the creche be placed on privately-owned property, church property, rotated among the churches?

MR. SCHWARTZ: Among other recommendations.

MR. LANDMAN: Yes. That has been one of their recommendations.

A The first recommendation, if I recall correctly, was that the creche be placed on Boniface Circle, the village board and mayor give permission to the Creche Committee to place it on Boniface Circle.

Q What other recommendations have they made that you are aware of?

A They have suggested that we try to place it on church property on a rotating basis.

Q And has an attempt been made to do that by your committee?

A When we first met with the Human Relations Committee in 1980 at their request, we gave them a list of reasons why that suggestion was not overly practical and they—

Q And what are those reasons?

A The first—one of the reasons that we gave was that we felt that it would destroy the ecumenical aspect of the Creche Committee. We also were aware that there were many churches in the group—the topography of the land at these churches was totally unsuitable. There are three churches that are on Route 22 in Scarsdale, which is a state road, 35 mile an hour traffic going by, not suitable, not in accord with the initial purpose of the creche, namely, that people stop by and view it.

Many of the churches were not centrally located, they were at a great distance away from the center of town. We felt that in some cases, such as in my church, which has an indoor creche and an outdoor creche, that it would be a little repetitious to have a third creche, and that would be true of any other church which would already have an outdoor creche.

That's all that I can just at the time remember, but we did explain in great detail to Mrs. Clark and her committee in 1980.

Q How would erection of a creche at various churches in the village destroy the ecumenical aspect?

A Because there would only be maybe one or two churches that possibly might fall into the realm of possibility.

Q Because of topography and location?

A Land-wise, et cetera. If the creche were placed at this church every year, then it would begin, after two years it would seem as if the creche was indeed the property of that particular church.

Q Just by the fact that it was placed on the same piece of land?

A Same spot, that's right.

Q It becomes identified with that—

A With that church, yes.

Q Would a sign—was there thought given to a sign that would say that it was not that church's creche but it was the creche of the committee?

A We prefer not to put a sign on the creche at all, and if you were on private property, that would not be necessary.

Q Why would that not be necessary?

A Because you would be on private property. The year that we were on the Frog Prince property, we did not put up a sign.

Q Would you agree that—what effect would a sign have if it was placed—if the creche was placed on church property and there was a sign that said, this is the property of the Scarsdale Creche Committee?

A I have no idea what effect that would have.

Q But you preferred not to have a sign, the committee preferred not to have a sign?

MR. SCHWARTZ: I object to the form of that question, but you can answer it.

Q Am I correct that the committee prefers not to have a sign on the creche?

A We certainly would prefer not to have a sign, but if it is required when we are on public property, we would certainly put it there.

Q Anything else other than what you have just said as far as why the rotating of the creche among the various churches would destroy the ecumenical aspect of the erection of the creche?

A I think that's the reason why.

Q That's the reason?

A Yes.

Q Is it your committee's view that the creche should be on publicly-owned land or is it your view that it should be on Boniface Circle, whether that is publicly-owned land or not?

MR. SCHWARTZ: Her views before the commencement of this lawsuit?

MR. LANDMAN: Yes.

MR. SCHWARTZ: Lawsuit aside, do you have a preference that it be on publicly-owned land no matter where as opposed to privately-owned land? Is that your question?

MR. LANDMAN: Yes.

MR. SCHWARTZ: Or put another way, if there were an equally suitable site, one publicly owned and one privately owned, would you care—

THE WITNESS: We would want it on the site that we thought would be the most attractive for the creche.

Q Whether it was publicly owned or not?

A Whether it was publicly owned or private.

Q Have your views changed since this lawsuit on that question?

A No, I don't think so.

Q Is part of the purpose of the Scarsdale Creche Committee to keep Christ in Christmas?

A The purpose?

Q Yes.

MR. SCHWARTZ: Go ahead, answer it.

A I think we established that at the beginning of our conversation, the two aspects of the creche.

Q And that would be one of them?

A The peace on earth and good will toward men and as a representation expressing the birth of Christ.

Q And the committee would view erection of the creche as a yearly tradition?

A Oh, yes.

Q I show you a newspaper article and ask that it be marked as Curran Deposition Exhibit D. It is produced from your files, I believe, and it's marked Scarsdale Inquirer, November 25, 1976. The headline is "Creche Moved; Lawsuit Planned."

(Newspaper article dated November 25, 1976 marked Curran Deposition Exhibit D for identification, as of this date).

Q Mrs. Curran, I show you this article and refer you specifically to the second paragraph, but why don't you take a look at the article and see if that is, in fact, an article which you have previously seen.

A You want the second—

Q The first question is whether or not this is an article which you've previously seen.

A Yes.

Q And it did appear at the time stated in the Scarsdale Daily Inquirer?

A Yes.

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Q Okay. That's fine.

MR. LANDMAN: I would like to have marked as Curran Deposition Exhibit F a November 23, 1976 letter to the Village Board from the Scarsdale Creche Committee.

(Letter dated November 23, 1976 marked Curran Deposition Exhibit F for identification, as of this date.)

Q Are you able to identify Curran Deposition Exhibit F?

A Yes. That was sent by the Scarsdale Creche Committee.

Q Did you draft this document?

A With the assistance of a few of the members of the committee.

Q The last paragraph on the first page states, "We would consider the removal of the creche from Boniface Circle an erosion of our spiritual values, and an affront to the drafters of our Constitution, whose intent was to protect religious freedom and an injustice to the people of Scarsdale whose interfaith activities have grown in stature over the years."

I take it you agreed with that paragraph when this letter was sent.

A Yes.

Q And does the committee believe that the erection of the creche is an interfaith activity?

A Yes.

Q And what are the faiths that participate in that activity?

A Over the years, the Presbyterians, Episcopalians, Lutherans, the Catholics, the Baptists, the Congregationalists, the Greenville Community Church.

MR. LANDMAN: I would like to have marked as Curran Deposition Exhibit G a two-page memo to Mayor Jensen and Board of Trustees from Lowell J. Tooley regarding village board meeting agenda for November 23, 1976.

(Two-page letter marked Curran Deposition Exhibit G for identification, as of this date.)

Q I show you Curran Deposition Exhibit G.

I ask you whether or not you are able to identify the handwriting.

A That is my handwriting.

Q And were those notes taken at a meeting?

A Those notes were taken at the village board meeting on November 23, 1976.

Q Could you read what those notes say, starting

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Q Would you be able to see the creche easier at night or the light bulb easier—I'm sorry—the sign easier at night without the street light?

A Would I be able to see the creche or the sign easier? I believe that passing by there at night, as I did several times, the entire structure was just an outline.

Q And after the light bulb was no longer used, was the street light working?

A No, not as long as we were there. I did notice that street light this year, it was working fine.

Q Did you ever investigate why it wasn't working on those prior years?

A I did in one particular year report it three—

MR. SCHWARTZ: Go ahead. I am sorry.

—times in a letter to the village, and I never received a response concerning as to why the light was out.

MR. LANDMAN: I would like to have marked as Curran Deposition Exhibit H, a memo to Mayor Jensen and the Board of Trustees from Lowell J. Tooley, subject village board meeting agenda for November 27, 1979.

(Memo marked Curran Deposition Exhibit H for identification, as of this date.)

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MR. SCHWARTZ: What's your question?

MR. LANDMAN: If I can see the document.

Q With regard to placing the creche on church property, the statement, "In addition, the members of the committee have unanimously agreed that the creche was originally intended to express the ecumenical spirit that exists among the churches in Scarsdale. To put an end to this longstanding tradition in our community is not the choice of the committee."

Is your explanation which you have previously testified about with regard to eliminating the ecumenical purpose what you were referring to in page 2 of this exhibit?

A Yes.

Q Could you identify the third letter, is that written by you?

A That is written by the Scarsdale Creche Committee and it is addressed to Rev. Kendall—to the Scarsdale Clergy Association in care of Rev. Kendall.

Q What was the purpose of that letter?

A We enclosed a copy of the letter that we had sent to Mr. Herbek, the letter that we had just spoken about, and we thanked those churches who had offered space to display the creche and suggested that we wished to continued the tradition, asked him to share both these

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A I think she is a lifetime resident.

MR. LANDMAN: I would like to have marked as Curran Deposition Exhibit N a statement of the Scarsdale Creche Committee, Mrs. John J. Curran, Chairman, November 11, 1981.

(Statement dated November 11, 1981 marked Curran Deposition Exhibit N for identification, as of this date.)

Q I would like to show you this document and just ask you whether you can identify and whether you authored this exhibit.

A This was a statement of the Scarsdale Creche Committee that I believe was submitted to the local newspapers.

Q Did you write it?

A In conjunction with other members of the committee.

Q And did you agree with everything that was written in it at the time you wrote it?

A Yes.

Q Would it be correct, then, to say that the village, by granting permission to use the Boniface Circle for erection of the creche, would be an example of church-state cooperation?

A Would we state that the village, granting us permission to place the creche on Boniface Circle, could be considered an example of traditional church-state cooperation?

Q Yes.

A I suppose you could, yes.

Q And you would consider it as such?

A Church-state cooperation, yes.

Q Did you consider that the creche's sole purpose was secular or was it a mixed religious and secular purpose, or was it solely a religious purpose?

A I think we had established that at the beginning of our conversation.

MR. SCHWARTZ: She has really answered that question already.

MR. LANDMAN: All right.

I would like to have marked as Curran Deposition Exhibit O a November 24, 1981 letter to Mayor Jean Stone from Lynne B. Clark, Chairman, Advisory Council on Human Relations.

(Letter dated November 24, 1981 marked Curran Deposition Exhibit O for identification, as of this date.)

Q I show you Curran Deposition Exhibit O and

UNITED STATES DISTRICT COURT
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[Butler Deposition Excerpt]

A My basic work involves institutional public relations. I work for the Japanese steel industry, among other clients, and I do an information program for them in the United States.

Q Meaning you write informational things?

A I write material, work on speeches, conduct meetings and seminars, travel to various cities.

Q The house you live in now is a single-family house?

A Yes.

Q It has a lawn?

A Yes.

Q Do you and your family display any kind of decorations at around Christmas time?

A Yes.

Q Do you have a Creche?

A Yes.

Q Where do you display that?

A I display the Creche on the top of my piano in the living room.

Q Do you have any outdoor decorations?

A Yes.

Q What are they?

A A Christmas wreath.

Q Do you have a lawn?

A Yes.

Q Is that in front as well as back?

A Yes.

Q Do you put a Creche there?

A No.

Q You never have?

A No.

Q Do you know, within your experience, whether any of the people who are plaintiffs with you in this case display creches at their homes at Christmas time, outdoors?

A No. Within my knowledge, no.

Q And when you say you never have, I take it that means your prior Scarsdale dwelling as well as the place you live now.

A That's correct.

Q Have you ever displayed a Creche in front of any house you occupied?

A No.

Q Do you know anyone in Scarsdale who has a Creche in front of his or her house?

A When you say "do you know," could you rephrase that and just what the word "know" means?

On the Xeroxes on the photos, we don't do as well, but if you have any trouble, let us know.

(A photograph was marked Butler Deposition Exhibit C for identification, this date.)

Q I'm showing you Exhibit C, and I ask you if that appears to be, to the best of your recollection, a photograph of the Creche as it appeared on Boniface Circle on one or more of the occasions when you observed it there.

A Well, frankly, I don't recall the specific placement, but you show me a picture—

MR. MURPHY: Just answer the question.

A I don't recall the specific placement in relationship to the flagpole.

Q Let me ask you this: As nearly as you can recollect, if I ask you, as I am, does this appear to be the way it looked, what is your answer?

A Well, I can only answer you honestly that I don't recall the placement at the time. I just don't recall it.

Q Looking at the Creche without the placement, does it look like the Nativity Scene that you saw on Boniface Circle?

A It appears to be the Nativity Scene that I saw in Boniface Circle.

Q Let me show you Butler Exhibit D.

(A photograph was marked Butler Deposition Exhibit D for identification, this date.)

Q Perhaps I should show you the original photograph because on the copies it may be excessively difficult. This is the new one, Exhibit D. Does that look like a detail you can recall from looking at the Creche?

A It appears to be the size of the figures that were part of the Creche display.

Q It appears similar to what you saw?

A Right, right.

Q It wouldn't surprise you if somebody testified that that was a picture taken—

MR. MURPHY: Objection to the form of the question.

Q You may answer. Would it surprise you?

A No.

Q And going back to Exhibit C, showing you the original, which I neglected to do before, does that assist you in any way in recognizing that as the Creche?

A As I had said, I didn't recall the the Creche placement in the proximity of the flagpole to where it appeared, just that it was in the grassy area, that was my recollection, my honest recollection.

Q That is, you don't recall it, as you perhaps jog your memory a little bit, as having been within ten or fifteen feet of the flagpole?

A Well, I don't remember the flagpole. I never took note of the flagpole, so I can't testify anything about the flagpole.

Q Keep Exhibit C for just a minute, if you would. Do you see in the lower left portion of the Nativity Scene what looks like a sign or a plaque?

A Yes.

Q I trust your eyes aren't so much better than mine that you can read that.

MR. MURPHY: Which photo are you talking about?

MR. FRANKEL: Exhibit C.

A Which is C?

Q The one in your right hand.

A No, I cannot read it.

MR. FRANKEL: I think we can stipulate that anybody who can read that is a freak. It doesn't come out in the photo.

MR. MURPHY: So stipulated.

Q But do you know what legend that plaque bore?

A No.

Q Do you know the substance of that legend?

A I know the substance of it.

Q What is it?

A The substance of it, to my understanding, was that it was maintained by the Creche Committee.

Q Mr. Landman draws my attention to Exhibit D, which is taken closer up to the Creche. Can you read the plaque on that?

A Yes, I can read it.

Q What does it say?

A "Creche Erected, Maintained by Scarsdale Creche Committee, A Private Organization."

Q You don't recall at this time the size of those letters on that plaque, do you?

A No.

Q Would you be able to tell us at what distance it could be read?

A No.

Q Would it be correct to say that it could not be read from the roadway passing Boniface Circle?

MR. MURPHY: By whom?

MR. FRANKEL: By anybody.

A Not by me. I assume that.

Q When you say not by you —

MR. MURPHY: Don't assume.

Q — is your vision poor?

A Yes.

Q Do you think somebody with acute vision could read it from the roadway?

A That I don't know.

MR. MURPHY: You're asking for an expert opinion?

MR. FRANKEL: Yes, I'm asking for an expert opinion.

MR. MURPHY: Objection to the form of the question.

MR. FRANKEL: I'm not testifying, but I think it will be shown that nobody could read it from the roadway.

Would you mark this Exhibit E, please.

(A photograph was marked Butler Deposition Exhibit E for identification, this date.)

Q I'm going to show you the original of Exhibit E, Mr. Butler, and ask you whether that appears to you to be the Creche as you saw it on Boniface Circle.

A Yes.

MR. FRANKEL: Can we have this marked Exhibit F.

(A photograph was marked Butler Deposition Exhibit F for identification, this date.)

Q I ask you the same question with respect to Exhibit F.

A Yes.

MR. MURPHY: Could you repeat the question for me, Mr. Reporter?

(The last question was read by the reporter.)

Q Now, you've said you didn't remember its location in respect of the flagpole because you didn't pay any attention to the flagpole, is that correct?

A I didn't — yes. I didn't notice it.

Q Do you remember — and perhaps I've asked this, and I apologize, but I don't remember the answer — do you remember its approximate distance from the War Memorial?

A You did ask, and, 30 feet or so. That's a guess.

Q When your group —

MR. MURPHY: Objection to guesses. Go ahead.

Q Your group is composed of people different from the Scarsdale Creche Committee, is it not?

A When you say "your group," —

Q The group who are plaintiffs in this action.

A The plaintiffs, yes.

Q And the group of applicants in February of 1983 differs from the membership of the Scarsdale Creche Committee.

A To my knowledge, yes.

Q When was your group formed?

A Could you just rephrase the question about —

Q When was the group which made the application of February 3rd, 1983, which is Butler Deposition Exhibit A, when was that group formed?

A Approximately sometime in late January or sometime in January.

Q In discussing the purposes and objectives of your group, did you consider where you would wish to put the Creche in Boniface Circle?

A I don't think the logistics were discussed.

Q Was there any discussion, if I may press you a little bit, of placing it in the same spot that it had occupied in the past?

A The general feeling would be it would be in a similar spot, yes.

Q About the same location?

A A similar location.

Q By similar spot, you mean geographically at a point around the same point on the ground, is that correct?

A Yes.

Q Tell me — I didn't bother you much with this and I won't — but do you remember how many years, in your experience, how many different years you observed the Creche at Boniface Circle?

A Two or three years.

Q Did you yourself during the Christmas season go to Boniface Circle with a special purpose to observe the Creche there?

A With the special purpose of observing the Creche only, no.

Q And if you wanted to expand on that, you may.

A That's it.

Q In the course of any given Christmas season, and I ask you to approximate, when you saw the Creche, on how many days do you think you observed the Creche?

A Two or three.

Q When you observed it, did you engage in any kind of private religious activity in the nature of praying or anything like that?

A No.

Q This case is about religion, so I have to ask that question. It did not play, as I understand you, any ceremonial role in your own religious observance?

MR. MURPHY: Objection. He didn't say that.

Q It is correct to say that it did not play any ceremonial role in your own religious observances?

A Could you rephrase it? What is this —

Q The Creche.

A The Creche on Boniface Circle?

Q Yes.

A So could you repeat the question?

Q You've done it for me. Did the Creche on Boniface Circle play any part in your own religious observances, yours?

A It was a commemoration of an event which was also the commemoration of Christmas, the birth of Christ, and in that regard it helped in my celebration of that particular season. That's the feeling I got out of it, anyway.

Q When your group formed and made the application of February 3rd, 1983, prior to applying, did you discuss the positions of the group and the positions it would take in respect of its application?

A Could you repeat that, please?

MR. FRANKEL: Read the question.

(The pending question was read by the reporter.)

A What time frame are you talking about? I'm still unclear.

Q At any time prior to making —

A At any time prior, did we discuss —

THE WITNESS: Read it again, please.

* * * * * *

Circle?

A Yes, I had a number of discussions.

Q Now, in those discussions, did you hear references to a view held by other residents of Scarsdale that if there were to be a Creche on public land, it ought to be somewhere other than Boniface Circle?

A If there were — could you repeat the last phrase?

MR. FRANKEL: Please read the question.

(The pending question was read by the reporter.)

A I didn't hear any reference to that, no.

Q And none of your people discussed that with you?

A No.

Q As you understood the position of the group, the application of which you authorized to have signed with your name, was the position that the Creche ought to be allowed at Boniface Circle and nowhere else?

MR. MURPHY: When you say nowhere else, you mean no other public property?

MR. FRANKEL: No other place is what I said.

A Our application was for the Creche in Boniface Circle. We didn't consider any other place. We only considered the Boniface Circle in terms of our application.

Q When you came to write an ad for the Inquirer

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A I seem to recall that discussion.

Q And do you recall that Mrs. McCreary said that was correct, that she did not consider placing it on church property rather than at Boniface Circle?

A My recollection is not clear on that. It's possible, but I just don't recall.

Q Were you aware that more than one church had, prior to December of 1982, offered its property as a site for a Creche?

A I'd heard that in discussions, yes.

Q And if you don't remember Mrs. McCreary's position, let me ask you what your position was. Were you willing to have the Creche, your group's Creche, placed on church property rather than the public circle?

A No.

Q Is it fair to say, then, without being vehement, that you insisted it should be at Boniface Circle?

MR. MURPHY: Insisted?

Q Insisted, and no place else?

MR. MURPHY: I object to that. You can answer.

A Yes, our application was to place the Creche in Boniface Circle.

Q And you knew, did you not, that there had been offers of church property?

* * * * * *

A No.

Q Now, will you tell us in your own understanding, the message intended to be conveyed by having the Nativity Scene on Boniface Circle?

A It's a commemoration of the birth of Christ which is celebrated at Christmastime.

Q Does it express your own religious convictions concerning the birth and the meaning of Jesus Christ?

A Yes.

Q Is one of its purposes to celebrate your personal religious convictions?

A I look upon Christmas as a celebration of the birth of Christ, and I celebrate in the birth of Christ as well.

Q But referring specifically to your purposes in wanting a Creche at Boniface Circle, is one of your purposes to celebrate your personal religious convictions?

A It's part of my religious convictions, and it's a time of celebration for me, and so it is part of my celebration, yes.

Q The Creche at Boniface Circle, if you can achieve its placement there?

A That's part — yes, that would be part of my celebration to commemorate the day and the time.

* * * * * *

Q It's not a compulsory way of expressing your faith, is it?

MR. MURPHY: What do you mean by compulsory?

Q Is it compelled by any doctrine of your church that you have a Creche displayed?

A No.

Q It's not compelled that you have one either on your own property or anybody else's property, isn't that right?

A Yes.

Q That's what I was really getting at. In that sense, it is a voluntary expression, well, in the same sense that we would still say that you're compelled to refrain from adultery by the dictates of your religion; isn't that right?

A Yes.

Q There is no such compulsion with respect to displaying a Creche, isn't that right?

A There's no compulsion.

Q And, in fact, many people who share the Roman Catholic faith that you once subscribed to, and your present religion, do not display creches?

A Many? I don't understand the question.

* * * * * *

issues, like raccoons.

Q I haven't asked you one question about raccoons. I have one here, but I'm going to—

A What was the question again?

Q The question is: It's true, is it not, that your effort to persuade the trustees to vote for the placement of a Creche or the allowance of a Creche at Boniface Circle has prevailed with some of them and not with others? It's not meant to be a trick question. It's obvious—

MR. MURPHY: It's not obvious. I don't know how you could know it. Do you mean some trustees agree with his position and some don't?

MR. FRANKEL:That's it.

A I can't answer the question.

Q Is the question of having a Creche at Boniface Circle a subject on which you would describe your feelings as being deep?

A Being deep?

Q Strong or deep?

A Strong. I feel I have or the people have the right to that display and, therefore, I have a deep conviction concerning that.

Q Is it your position that on such a subject

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MR. FRANKEL: I don't remember the words I used, but I'm going to ask you now again—

MR. MURPHY: Ask the question, Judge, and we can proceed. Just note my objection to the question.

BY MR. FRANKEL (Continuing):

Q I want to know whether your deep conviction about the right to place a Creche on Boniface Circle plays any part in your judgments when you vote for trustee.

A It plays a subjective role in the way I vote.

Q Do you and your neighbors—I know about your nonpartisan slate, but do you and your neighbors discuss the trustee elections?

A To a certain extent, but very limited.

Q In those discussions, have your heard others say that the position of the candidate respecting the Creche affects the way they vote?

A Very little of that.

Q Have you heard some?

A If some, one or two people; very, very little.

MR. FRANKEL: Could we take about five minutes while we see if we have anything more?

(Short recess taken.)

MR. FRANKEL: On the record.

BY MR. FRANKEL:

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SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED IN PRINTING]

[Stone Deposition Excerpt]

A Oh, no; he simply got a higher position.

MR. MURPHY: Would you please mark as Stone Exhibit 1 a copy of a letter purportedly to Mrs. Stone dated November 20, 1982, from Dorothy S. Patterson.

(Copy of letter dated November 20, 1982, to Mrs. Stone from Dorothy S. Patterson, marked Plaintiffs' Exhibit (Stone) 1 for identification, as of this date.)

BY MR. MURPHY:

Q Can you identify this letter?

A I remember this letter because I tried to answer it and I couldn't find this woman high and dry. I called every person I could think of in Garden City and I couldn't find her.

Q This letter is to you. You did receive the letter, I take it?

A Yes, I did.

Q Did you receive this letter on or about the time of its date?

A To the best of may knowledge, yes.

Q Were copies of that also sent to the other members of the Board of Trustees?

A It says that it was.

Q Did you discuss that letter with any of the other members of the Board?

A I don't remember.

Q The letter, ma'am, refers in part to the use of Wayside Cottage by a religious organization.

A Yes.

Q Is that accurate, by the way?

A Yes, I believe it is.

Q Were you aware of it at the time you received the letter, or did the letter bring it to your attention?

A No; this letter brought it to our attention.

Q Does that religious organization or any other religious organization still use Wayside Cottage?

A You know, I am not mayor now. I really don't know.

Q As of the date you ceased being Mayor.

A Yes.

Q Did you feel that that use of Wayside Cottage was in any way inappropriate?

A All of these things were a puzzlement to me. As I say, I am not an attorney, and as this got—took a more legal turn, the answers got harder and harder.

But the differentiation between, say, this use and one use and another use, it is a hard thing for me. It's hard for me to say—answer you, did I feel it was an inappropriate use.

If I have to say yes or no, I will have to say no, but it certainly is a gray area.

Q With that qualification, which I can fully understand, why do you make a distinction in these two situations, one being the use of the cottage by the congregation and the other being the display of the Nativity Scene, in your own mind?

A In my own mind, in the first place, the village leases on a ten-year basis for the Junior League of Scarsdale Wayside Cottage.

So in a sense they are the renters, they rent to various people because they need the income to run it.

Also, that particular use—and another religious group uses it as well—is a coming and a going kind of use. It's a "speaking" use.

The Creche, the placement of the Creche in the center of the village, you know, in Memorial Park, is more permanent, it is a solid seeable religious artifact—if that is not a bad word—I don't know—and you see it there in the heart of Scarsdale on village property like the village is supporting it.

The other is a renter who comes in to Wayside Cottage, which is leased for a ten-year period by the Junior League of Scarsdale.

Q Were you aware or are you aware that the village nevertheless contributes to the Wayside Cottage upkeep and what have you?

A Oh, yes.

Q And the distinction in your mind, if I understand what you are saying, is in part that the use by the congregation of Wayside Cottage isn't something that's perceived by the village, is that—

A You mean "seen," by "perceived"?

Q Yes.

A It's more that it is a transitory use, that it's an oral use, as it were. It's not something that's an object, a clearly defined religious object sitting on village property.

Q You don't consider the holding of religious services there—

A I have never been to one of the services. I really truly don't know whether seeing that letter

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A After the Creche vote, particularly the first year, I received—people assumed that if you voted against the Creche you were Jewish. Everyone assumed that I was Jewish because my husband is and my last name is Jewish.

Q Is "Stone" a Jewish name?

A It can be either way, yes.

And I received an awful lot of antisemitic letters. I am not saying they came from Scarsdale residents necessarily, but I have no way of knowing. I threw a great number of them away because they were trash.

I was told that there were antisemitic incidents at the high school with some of the Jewish students.

Q You were told that?

A I was told that.

Q By whom?

A Joel Lesnick, the president of the Board of Education.

The merchants were threatened with a boycott, and there were antisemitic overtones to that. Many people assume—some people assume that merchants are by their nature Jewish. The fact that most of these were Catholic was beside the point.

That led to my feeling that antisemitism was alive.

Q Can you tell me who threatened merchants with a boycott?

A No, I can't.

Q Can you tell me how you know about it?

A There was a flier, I believe there was a flier circulated in mailboxes and under windshield wipers on cars.

Q Do you know the source of those fliers?

A No.

Q Do you know if they originated in Scarsdale?

A No.

Q Why do you say that there were "antisemitic overtones," to use your expression, or is that something you are assuming?

A I am trying to remember.

Somewhere, either it was in a letter or in the flier—which I don't have—somewhere there was stated—I really can't—I would tell you if I knew—that "Why should the Jewish merchants get fat on our Christmas shopping when they won't allow our religious display."

Q Is this a letter or is it—

A I really don't know.

MR. MURPHY: I would ask for the production of that piece of paper, because I haven't seen it.

Q When was this?

A That was the first year.

Q 1981?

A Yes.

MR. LANDMAN: If we have it we will produce it.

MR. MURPHY: I would assume that; it goes without saying.

Q Is there a requirement in Scarsdale law or regulation that letters that come in to the Board of Trustees or what have you are maintained?

A Are kept?

Q Yes.

A When they come to Village Hall; because I get a lot of these in my home.

Q I see.

A Yes, they are stamped in and they are filed.

Q When you refer to an "awful lot of antisemitic letters," are these letters that came to you personally at your home or through the Village Hall?

A Both.

Q When you say you threw a lot of them out, that was, I take it, in 1981?

A Mostly in '81.

Q These, I take it, would be ones that came to your home personally?

A Yes.

Q When did you throw them out?

A I threw them out on receipt.

Q How do you define "antisemitic"?

A I wouldn't want to—

Q How do you determine? why do you label something—

A Because they use foul language in describing Jews.

Q That's your definition?

A That's part of it.

Q Is there anything else?

A Well, talking about Jews not fighting in wars, and standard type hatred slogans.

Q This is the kind of thing we would call "from crazies"?

A I would say a lot of it's from crazies.

Q An awful lot? You are talking about a roomful of letters or—

A No; I am talking about between 100 and 200 letters.

Q You threw out all of them?

A No; you have some of them.

Q How many did you throw out, if you recall?

A I have also tell you that Jan Seick threw out some, because she didn't want me to see them.

Q These would have been letters that came in through the—

A But addressed to me.

Q Well, to the Mayor?

A Yes.

Q Putting aside Ms. Seick for a minute—

A Yes, I would say I threw out fully half of them.

Q Half is what? Approximately, we are talking about what?

A 50, 70.

Q That were addressed to you personally.

A Well, my name got circulated through a newsletter with my address.

Q Where were these letters from?

A All over.

Q You mean all over the country?

How many of them, if you know, were from Scarsdale?

A Some would be postmarked Scarsdale but not signed. I would be guessing to give you a number.

Q Let me ask you this question:

Do you feel they represented the feelings in the Scarsdale community?

A Of some people, yes.

Q Would you say a majority of the people?

A No.

Q It would be a small minority of the people, if any, wouldn't it?

A I would think it would be a minority.

Q I would certainly hope so.

A small minority?

A Of raging antisemites, yes.

Q Were the antisemitic incidents at the high school described to you by Mr. Lesnick?

A No.

Q You make reference here to "the old

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time; and Bill Glendon.

Q Did they all run unopposed?

A No. I believe Warren Grossman ran in that election. But, you see, he didn't specifically run for any—

Q In any event, this would have been March of '82. And Ed Falkenberg, was he on the Board in December of '81?

A Yes.

Q And didn't he not vote against the Creche in December of '81?

A He voted against it.

Q And he was elected in March of '82?

A Yes.

Q Is the same true for Mrs. Underweiser?

A Yes.

Q Did you and Mrs. Underweiser in this conversation discuss why you needed a witness for this lawsuit?

A No.

Q What was your opinion of why you needed a witness?

A May I check with Judge Frankel?

MR. FRANKEL: Mrs. Underweiser is a lawyer as well as a defendant and has been acting in tandem with us, so I think I am going to plead a privilege on that.

Moreover, the two of them as defendants, if they discussed together the reasons we asked them to inquire about witnesses would reflect our legal advice, and I would plead privilege on that further ground.

And I will instruct the witness not to answer.

MR. MURPHY: Okay.

My saying "Okay" is not meant to intend that I agree with anything that counsel is saying, but if he instructs the witness not to answer, I am powerless to proceed on that at this point.

BY MR. MURPHY:

Q Has Mrs. Underweiser been retained by the village to represent them in this lawsuit?

A No. but she is chairman of the law committee.

Q Is it a fact that whatever rules the Board operates under, that if a resolution does not receive a majority vote, that it is defeated?

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED IN PRINTING]

[Tooley Deposition Excerpt]

MR. MURPHY:

Q Mr. Tooley, will you state your name and address for purposes of the record, please.

A My name is Lowell Tooley. My address is 111 Spier Road, Scarsdale, New York.

Q How are you employed, sir?

A I am the Village Manager, Village of Scarsdale.

Q How long have you been so employed Mr. Tooley?

A I have been the Village Manager since April of 1961.

Q How were you employed before April of 1961?

A I was the Assistant Village Manager of Scarsdale from February, 1956 to '61.

Q How were you employed, if you were, sir, prior to February, 1956?

A I was Village Engineer and Manager for the Village of Shorewood Hills, Wisconsin.

Q I am sorry, I didn't get the name; is the

* * *

A Yes.

Q What is that degree?

A Bachelor of Science and Civil Engineering.

Q Did you serve overseas in the war?

A No.

Q Sir, can you tell me in general what your duties are as Village Manager of Scarsdale?

A Well, in general, I am the chief administrative officer.

Q If I may, my analogy, I am more familiar with corporate government than municipal government. It is fair to say that we could draw a proper analogy between a chief executive

officer of a corporation and a board of directors on the one hand, and your job on the board of trustees of Scarsdale on the other?

MR. LANDSMAN: I object to the form.

You may answer, Mr. Tooley.

A I am not clear as to my understanding of your analogy. But in general terms, I would answer that it would be my impression that that is the case.

Q That is fair enough.

As I understand the job, you are in effect the chief operating executive on a day-to-day basis on the Town government, is that fair?

A Yes.

And I would like to make a brief comment about the use of the word "executive."

Q By all means.

A The State statute declares the mayor to be the chief executive officer in a village of the type Scarsdale is, and, therefore, the administrative duties of the manager are those which are delegated to the mayor by the board of trustees, whereby the local law creating the position.

Q I understand.

The mayor of Scarsdale, I take it, is not supposed to be in any way a full five day a week—

A That's right.

Q To whom do you report to, Mr. Tooley?

A The mayor and the board of trustees.

Q Who reports to you, sir?

A All departments of the Village government are responsible to me.

Q And they are all under your supervision?

A Yes.

Q All right.

A So as not to be confused, the Village library, for example, is not part of it.

Q Is there a Highway Department?

A Yes.

Q Is that under your supervision?

A Yes.

Q Is there a Parks Department?

A No. There is a Department of Parks and Recreation.

Q And are the parks maintenance use of under the supervision of that department?

A Yes.

Q And they report to you?

A Yes.

Q How about fire and police, sir?

A Yes, they report to me.

Q Is that one department or two?

A Two.

Q How about legal?

A The Village attorney is appointed by the mayor with the approval of the board of trustees, and had dual reporting functions.

The Legal Department is responsible to me for personnel and purchasing, responsible to the mayor, board of trustees for policy.

Q How about the defense or prosecution of

* * *

It is a period of time around December 25, which might be two or three weeks before that.

Q Was there ever any problem caused by the length of time the creche was on display?

MR. LANDSMAN: Object to the form.

Q In any of the years we are talking about?

A Was there any kind of problem?

Q Caused by the length of days in which the nativity scene was allowed to be displayed?

A You mean—could you explain what you mean by problem?

Q Any problem. Did anyone ever complain that it's up there too long?

A I don't believe that I am aware of any.

Q Did the length involved in each particular year ever create any safety problems?

A Not that I am aware of.

Q Any traffic problems?
A Not that I am aware of.
Q Where in the part was the nativity scene displayed?
A On the Chase Road side of the park, I would judge, just in back of the sidewalk.
Q That would be on the—
A East side.
Q That would be on the east side, on the opposite side of the park from the war memorial?
A If you consider the part to be a triangle, it would be on the leg.
Q The other bottom leg of the triangle?
A The other leg.
Q The bottom leg?
A One leg, there are three legs in a triangle.
Q Okay.
Was it always in the same spot every year?
A To my recollection, yes.
Q Was any problem, again, traffic, safety, threat to the public order, what have you, ever caused by the location, particular location in the par of the display?
A Not that I am aware.
Q Did anyone ever object to the particular location in the park of the display?
MR. LANDSMAN: I object to the form.
Q I am not talking in general as to having it at all, but as to where it was in the park?
MR. LANDSMAN: Object to the form.
A No one objected to me.
Q Are you aware of any objection by anyone?
A I am not aware.
Q Did anyone, sir, to your knowledge ever complain? Again, I am talking about the Scarsdale Creche's nativity scene, Scarsdale Creche Committee's nativity scene, which I understand was last erected in 1980 in Boniface Circle.
Did anyone every complain about the proximity of the nativity scene and the war memorial?
A Not to my knowledge.

Q I ask you the same question with respect to the flag pole?
A No.
Q The answer is no?
A My answer is no.
Q By the way, sir, the American Legion, when the Creche applications were denied in '81 and '82, did the American Legion take a position on these?
A I don't know.
Q You don't know?
A I don't know.
MR. MURPHY: Would you please mark as Exhibit 21, a copy of the letter dated December 8, 1982, from Mr. James Metts, County Commander of
* * *
Q Have they been authorized to place banners anyplace else?
A I don't know of any authorization for banners, but they did have the symbol of the Red Cross in Depot Plaza—
Q But other—I am sorry.
A —Circle at some time.
Q Have you ever seen any banner or sign or cross that the Red Cross might have placed in Boniface Circle?
A Not that I recall.
Q But you recall them putting them in other locations, specifically at this bridge?
A Yes.
Q And is it your understnading that they were allowed to place them there in connection with their fund raising efforts during March?
A Yes.
Q Were there any discussions of any of those authorizations that you recall that the board had?
A I don't recall.
Q In general, do you recall any discussions between the board trustees regarding approval of the various uses that have come out over the years for use of the property?

For example, by the Boy Scouts, Girl Scouts, the American Field Service Club? When those letters requesting permission to do various things, which we stipulated are going to be coming into the record, were there discussions about whether those were fine uses; whether those were worthwhile purposes; and that, therefore, they should be authorized?

MR. LANDSMAN: I object to the form.

A Generally speaking, in response to the characterizations you have just used here of organizations, my recollection does not relate to the specific worth of a group or a purpose like United Way, so much as it would relate to other factors.

What kind of precedent does it establish? What does it do to traffic? What does it do to esthetics? Is it going to be something that in the opinion of the trustees it would be an affront to your sensibilities? Subjective kinds of evaluations as opposed to the merits of an organization itself.

And I do not mean by that that the merits of an organization are not significant in the decision. As an example, when the pumpkin sale is held at Chase Road, the Village board is very much aware that the proceeds are to be used for whatever they are, AFS or something of that sort, and would not be compelled—would not feel compelled in any judgment to extend the same privilege to an organization which was personal—

Q What do you mean by "personal"?

A People have applied for permission to sell Christmas trees on public land.

Q Um hum.

A And to keep the money. That is their, it is a commercial thing, and so all has been denied.

Q Mr. Tooley, who derives the proceeds from the proceeds of artwork at the annual or—at the bi-annual Scarsdale Bi-Annual Art Shows?

A I don't know. The Village doesn't.

Q Do you know whether any individual members retain the proceeds?

MR. LANDSMAN: Object to the form.

A I don't know if there are proceeds.

Q Do you know whether the Art Association has sold any of its artwork at those displays?

A I don't know.

Q Have you read the minutes?

A Of?

Q Of the board.

A The Village board?

Q Over the years.

A Yes.

Q Another question I have for you is about walk-a-thons. Have there been a lot of requests for walk-a-thons and marathons, and similar projects?

MR. LANDSMAN: Object to the form

A There have been requests for the conduct of marathons and walk-a-thons, and there have been a number of such events scheduled in the last few years.

Q Were you ever requested by the board to submit any criteria for their use in deciding whether or not a particular organization should sponsor or be permitted to sponsor a walk-a-thon?

A No. I have been requested to submit criteria for the behavior, I mean you can't throw papercups along the street, rules for the walk-a-thon promoters to abide by, and that sort of thing.

I don't recall any documentation for the termination of the organization to sponsor it.

Q Do you recall a discussion, though, about which organizations would be allowed to have such walk-a-thons, and which would not, in the board

* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED IN PRINTING]

[Plaintiffs' Answers To Interrogatories]

Plaintiffs in Civil Action No. 83 Civ. 3266 hereby answer Defendants' Interrogatories as follows:

* * *

In the fall of 1982, before applying for permission to place the creche at Boniface Circle, Plaintiff Curran spoke with Ms. Clark about the possibility of displaying the creche on property other than Boniface Circle. Ms. Clark stated that a Mr. Ruggliano had told Ms. Clark that Mr. Malcolm Wilson, Chairman of the Manhattan Savings Bank, had advised Monsignor John Breheny of Our Lady of Fatima that the Creche Committee could display the creche on the bank's property during 1982. Plaintiff Curran advised Ms. Clark that that location would be acceptable to the Creche Committee and that she would speak to the Committee representatives. Plaintiff Curran contacted Plaintiff Pedulla, the Creche Committee representative of Our Lady of Fatima, to confirm whether Monsignor Breheny had received the offer. Plaintiff Pedulla called Monsignor John Breheny who stated that Mr. Wilson had not conveyed an offer to him for the use of the bank's property.

1983:

Plaintiffs have not made an effort to place the creche on property other than Boniface Circle to date.

Interrogatory No. 3

3. Please state whether the plaintiffs or any of them have ever been offered any site on which to place the said creche or

any other creche during the years 1960 through 1983. If any other sites have been offered, identify the sites and the owners of the sites which were offered.

Answer

1970-1975:

Plaintiffs were not offered any site on which to place the creche or any other creche.

1976:

Plaintiffs were aware that five churches had written to the Village Board to offer their property to the Creche Committee on a rotating basis for the annual display fo the creche. Those five churches were:

(1) Church of St. James The Less - Church Lane, Scarsdale, New York 10583

(2) Greenville Community Church - 270 Ardsley Road, Scarsdale, New York 10583

(3) Hitchcock Presbyterian Church - 6 Greenacres Avenue, Scarsdale, New York 10583

(4) Scarsdale Community Baptist Church - Popham Road, Scarsdale, New York 10583

(5) Scarsdale Congregational Church - 1 Heathcote Road, Scarsdale, New York 10583

1977:

Plaintiffs were aware that five churches had written to the Village Board in 1976 to offer their property on a rotating basis and that some of those sites might be available.

1978:

Plaintiffs were aware that five churches had written to the Village Board in 1976 to offer their property on a rotating basis and that some of those sites might be available.

1979:

Plaintiffs were aware that five churches had written to the Village Board in 1976 to offer their property on a rotating basis and that some of those sites might be available.

1980:

Plaintiffs were aware (1) that five churches had written to the Village Board in 1976 to offer their property on a rotating basis and that some of those sites might be available and (2) that a Mr. Gerry Conklin of 253 Mamaroneck Avenue, had written a letter to the Scarsdale Inquirer to offer his front lawn for the display of Plaintiffs' creche.

1981:

Plaintiffs received an offer from Mr. Roanld B. Durning to place the creche at 28 Chase Road.

Plaintiffs were aware that five churches had written to the Village Board in 1976 to offer their property on a rotating basis and that some of these sites might be available.

1982:

After Plaintiffs were denied permission to display the creche at Boniface Circle on December 2, 1982, Plaintiffs learned that Mr. Durning was offering the site of the former Frog Prince Proper Restaurant at 28 Chase Road.

Plaintiff Curran received a letter dated December 5, 1982 from the Scarsdale Congregational Church offering its property for the display of the creche.

Plaintiff Joan Mann learned that her church, the Scarsdale Community Baptist Church, was offering the use of its property to the Committee.

Plaintiffs were aware that churches other than the Scarsdale Congregational Church and the Scarsdale Community Baptist Church had written to the Village Board in 1976 to offer their property on a rotating basis and that some of those sites might be available.

1983:

Plaintiffs are aware that the Scarsdale Congregational Church's 1982 offer stated: "This offer is made unconditionally for this year only, or permanently, as desired."

Plaintiffs are aware that churches other than the Scarsdale Congregational Church had written to the Village Board in 1976 to offer their property on a rotating basis and that some of those sites might be available.

Interrogatory No. 4

4. If any sites were identified in response to interrogatory 3, please state whether the offer was accepted, and if it was refused, state the reasons for the refusal.

Answer

1976-1980:

Plaintiffs declined to accept the offers identified in response to interrogatory 3 in the years indicated for the following several reasons:

(1) None of the sites were located in the center of the Village of Scarsdale except for the Scarsdale Community Baptist Church. The size and landscaping of the Scarsdale Community Baptist Church's property are such that the creche's display at that location is limited to a side street where the creche would not be sufficiently noticed or appreciated.

(2) Plaintiffs did not wish to display the creche on any individual church's property because the creche was commissioned for display as an ecumenical project. In addition to the fact that the creche would not be sufficiently noticed or appreciated on the property of the Scarsdale Community Baptist Church, Plaintiffs did not wish to display the creche there annually because Plaintiffs did not wish the creche to be identified in viewers' minds as that particular church's creche.

(3) It was not possible to place the creche on some of the sites because the topography was unsuitable; the creche needs to be erected on a flat surface.

(4) Several of the locations were inadequate because the creche would only be viewed from cars passing by; Plaintiffs wished to display their creche at a location where pedestrians who so desired could stop and admire the creche.

(5) Several of the churches which made offers already displayed their own creches; Plaintiffs believed that the communicative impact of their display would be diminshed if such duplication were to occur.

1981:

Plaintiffs accepted Mr. Durning's offer.

Plaintiffs declined to accept the churches' 1976 offer in the year indicated for the same five reasons identified above for the years 1976-1980.

1982:

After Plaintiffs were denied permission to display the creche at Boniface Circle, Plaintiffs decided not to erect the creche.

1983:

Plaintiffs have not accepted or declined any offer in the year indicated to date.

Interrogatory No. 5

5. Please state the facts upon which the allegations contained in paragraph 11 of the complaint that the United Way, the Red Cross and the Association of Foreign Students were granted use of Chase Park or Boniface Circle were based. Include the dates, the sites, the purpose and duration of such usage.

Answer

The United Way

Plaintiffs' allegation in Paragraph 11 of the complaint that the United Way was permitted access to and use of either Chase Park or Boniface Circle was based upon statements contained in the minutes of the Village Board's November 23, 1982 meeting. The minutes of the Village Board's October 10, 1961 meeting reveal that the Board unanimously granted permission to the Scarsdale Community Fund (rather than the United Way) to erect a facsimile of a rocketship in the

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CLERK

No. 84-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, et al.,

Petitioners,

—v.—

KATHLEEN S. MCCREARY, et al.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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November 29, 1984

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case, which raises the question of whether private persons may compel a municipality to permit the display of a Nativity scene measuring nine feet by six feet by three feet on public land for an extended period of time during the Christmas season, illustrates a tension between the Free Speech Clause and the Establishment Clause of the First Amendment.

The Court's approach in cases involving a similar tension between the Free Exercise and Establishment Clauses has been to avoid a doctrinal formulation which subordinates one clause to another. E.g., Larkin v. Grendel's Den, 459 U.S. 116 (1982); Thomas v. Review Board, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972). See Welsh v. United States, 398 U.S. 333, 356-57 (1970) (Harlan, J., concurring). Instead, the Court has sought a resolution which, to the fullest

extent possible, respects the core values underlying each clause. Compare, e.g., Larkin v. Grendel's Den, supra, and Stone v. Graham, 449 U.S. 39 (1980), with Widmar v. Vincent, 454 U.S. 263 (1981). Such an approach, amici believe, is the proper method of resolving this case.

Respect for the core values of the Free Speech Clause compels a recognition that speech about religious themes is clearly entitled to First Amendment protection. Widmar v. Vincent, supra. Moreover, respect for the communicative significance of symbols compels a recognition that the display of religious symbols is highly protected communicative activity precisely because symbols are often a more powerful method of communication than purely verbal speech. Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969);

Stromberg v. California, 283 U.S. 359 (1931).

Where, however, the display of religious symbols on public land poses a danger of the appearance of state endorsement of the religious message, respect for the core values of the Establishment Clause compels a recognition that a municipality may (and in certain circumstances must) decline to permit certain sectarian religious displays on public land.

In those settings where the appearance of government endorsement of religion cannot be demonstrated by articulable facts, no countervailing Establishment Clause concern exists, and the Free Speech Clause fully protects the private display of religious symbols on public property. Widmar v. Vincent, supra; Fowler v. Rhode Island, 345 U.S. 67 (1953); Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); O'Hair v.

Andrus, 613 F.2d 931 (D.C. Cir. 1979).

Thus, in Widmar v. Vincent, supra, the use by a student group of a university classroom for religious activities prior to the opening of the school day was deemed protected speech precisely because, in a university setting, permitting religious speech in one unused classroom could not reasonably be perceived as an endorsement of religion. Similarly, in O'Hair v. Andrus, supra, permitting the celebration of a Papal Mass on the Mall was deemed permissible because, given the obvious lack of an appropriate alternative site, permitting the use of public land could not fairly be viewed as anything more than religious toleration.[1]

Conversely, when the risk of an

---

[1] A fortiori, when private religious speech takes place on private property, no threat of an appearance of public endorsement exists. Accordingly, the private display of religious symbols on private land is fully protected by Free Speech principles. Cf. Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977).

appearance of government linkage with religion is clear, as it is in the context of permanent or semi-permanent displays by private persons of religious symbols on public land, respect for Establishment Clause values would compel -- not merely justify -- a prohibition on the displays.

Thus, in ACLU v. Rabun County Chamber of Commerce, 510 F. Supp. 886 (N.D. Ga. 1981), aff'd and remanded, 678 F.2d 1379 (11th Cir. 1982), aff'd and remanded per curiam on reh'g, 698 F.2d 1098 (11th Cir. 1983), and Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117, op. withdrawn, 459 P.2d 222 (Or.), further reh'g, 463 P.2d 360 (Or. 1969), cert. denied, 397 U.S. 1042 (1970), vacated under changed circumstances sub nom. Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976), courts ruled that the permanent display of privately owned crosses on public land constituted a violation of the

Establishment Clause. See also Stone v. Graham, 449 U.S. 39 (1980) (per curiam); cf. Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857 (1953) (private distribution of Gideon Bibles on school property violates Establishment Clause), cert. denied, 348 U.S. 816 (1954).

Where, as here, a municipality has determined that a given religious display on public land for a two-week period during the Christmas season would be destructive of Establishment Clause values because it would be perceived by many as improperly linking religion and government, the imperative to respect Establishment as well as Free Speech values argues that the municipality's judgment be upheld, since the judgment was based on an articulable set of facts demonstrating a substantial danger to Establishment Clause values. Indeed, given the factors discussed infra at 18-23, amici

believe that were Scarsdale to have permitted the display, it would have been in violation of the Establishment Clause.

ARGUMENT

A MUNICIPALITY MUST REFUSE TO PERMIT PUBLIC LAND TO BE USED FOR THE DISPLAY OF RELIGIOUS SYMBOLS WHICH WOULD BE VIOLATIVE OF THE ESTABLISHMENT CLAUSE IF DISPLAYED BY THE MUNICIPALITY ITSELF WHEN, AS HERE, SUBSTANTIAL DANGER EXISTS THAT THE DISPLAY WILL APPEAR TO LEND THE IMPRIMATUR OF THE STATE TO RELIGION

In Lynch v. Donnelly, 79 L.Ed.2d 604 (1984), this Court ruled that the inclusion of a creche by a municipality in a comprehensive holiday display including numerous traditional secular symbols of the Christmas season, such as Christmas trees, reindeer, Santa Claus, banners, toys and colored lights, neither evinced a purpose to advance religion nor had the forbidden effect of endorsing religion. Accordingly, this Court declined to override the municipality's decision that display of the creche would not

violate Establishment Clause values. In Lynch, both the Chief Justice and Justice O'Connor, concurring, stressed the fact-bound nature of the Court's decision. Lynch v. Donnelly, 79 L.Ed.2d at 608, 614, 622-23. Each noted that government displays which treated religious symbols not merely as one among many symbols of the holiday season, but as an undue expression of the holiday's religious significance, would cross the line from neutrality to endorsement and, thus, would violate the Establishment Clause. Not surprisingly, therefore, in the wake of Lynch, lower courts have enjoined municipal displays which have unduly emphasized the religious nature of the holiday. See, e.g., ACLU v. City of Birmingham, 588 F. Supp. 1337 (E.D. Mich. 1984).

Respondents candidly concede that, unlike the display in Lynch, the display at issue in this case consists solely of a

sectarian religious symbol and is not part of a general attempt to display the traditional symbols of the holiday season -- secular and religious alike. Pet. App. 49a n. 14. Moreover, they concede that the use of public land is indispensable to the "ecumenical" content of their message that Christmas is a Christian religious holiday, amply justifying the district court's finding that "an aura of Village approval" of their religious message is precisely what respondents sought to convey. Pet. App. 57a.

Given the emphasis placed by the Lynch majority on the association of the creche with secular elements in holding that the display in that case had neither the purpose nor effect of endorsing religion, it seems clear that if the Village of Scarsdale sought to display the creche sought by respondents as an "ecumenical" symbol of Christmas to remind its residents that Christmas remains a

Christian holiday, Scarsdale would undoubtedly violate the Establishment Clause. The issue posed by this case is whether a private group can compel Scarsdale to permit the erection of a creche on public land, designed to convey precisely such a sectarian message, despite Scarsdale's fear that the display will be perceived as government endorsement of a sectarian view of Christmas.[2]

---

[2] Thus, this case does not involve the power of a municipality to restrict speakers engaged in communicative activity that does not implicate or endanger Establishment Clause values. It is the existence of two clauses of the First Amendment -- Free Speech and Establishment -- tending in different directions that gives this case its uniquely difficult cast. Were the speech at issue in this case not calculated to erode Establishment Clause values, the public forum analysis of the Second Circuit would, amici believe, be fully correct. In particular, we do not agree with the petitioners that government, without any rules and on the basis of vague and ill-defined interests, has discretion to pick and choose among those non-religious symbols which Americans may display in public fora. To be sure, there may be a role for time, place, and manner regulations; but Scarsdale has not seen fit to promulgate any. Compare Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), with Clark v. Community for Creative Non-Violence, 82 L.Ed.2d 221 (1984).

In effect, this case poses the obverse of Lynch. In Lynch, the Court upheld a municipal decision that a given display by a municipality would have neither the purpose nor effect of appearing to place the imprimatur of the state on the Christian doctrine of Divine Birth. In this case, a municipality has made a contrary decision, fearing that certain religious displays on public land, even if privately sponsored, would appear to place the prestige of the government behind a given sectarian message.

Amici believe that while the private display of religious symbols on private property is entitled to full protection under the Free Speech Clause, and while private religious speech on public property is undoubtedly entitled to substantial First Amendment protection, the Village of

Scarsdale retains power to safeguard Establishment Clause values by declining to permit an overtly religious display on public land for an extended period of time under circumstances posing a substantial danger of an appearance of religious endorsement. Cf. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 509 (1969); compare, e.g., Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) (cited approvingly in Tinker; finding "substantial risk of disruption" test not met), with Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966) (also cited in Tinker; finding substantial risk of disruption).

Of course, not every display of a religious symbol on public land carries with it a danger of appearing to place the imprimatur of the State on religion. For example, where a religious display takes place in the context of a religious

observance utilizing public land as the only convenient gathering place, as in O'Hair v. Andrus, supra, the danger of an appearance of government endorsement of religion is not sufficiently great to implicate Establishment Clause values.[3] As in O'Hair, when no convenient private site exists for a given religious display, permitting public space to be utilized for the display should be perceived by any reasonable observer not as appearing to endorse religion, but as an understandable attempt to permit the free exercise of religion. O'Hair v. Andrus, supra.[4] Similarly, when a religious event

[3] The ACLU filed a brief in support of the federal government in O'Hair, arguing that allowance of the open-air Papal Mass on public property in that case was required by the free speech clause and raised no substantial risk of governmental imprimatur. State-supported chaplains in the military and in prisons are permissible for much the same reason. See, e.g., Abington School District v. Schempp, 374 U.S. 203, 296, 306 (1962) (concurring opinions); id. at 309 (dissenting opinion); Anderson v. Laird, 466 F.2d 283, 298 (D.C. Cir.) (Leventhal, J., concurring), cert. denied, 409 U.S. 1076 (1972).

takes place in a public forum in the context of numerous contemporaneous secular uses, the danger of an appearance of endorsement is insufficient to justify a limitation on religious speech. Widmar v. Vincent, supra; Heffron v. ISKCON, 452 U.S. 640 (1981). Thus, religiously oriented events such as marches, demonstrations, leafletting, and the like taking place in a public forum would raise no substantial or even colorable risk of imprimatur.

Where, however, a private religious display appropriates a public space for an extended period of time, neither a pro-forma

[4] Of course, where the government adds valuable services to religious speech beyond those granted to other non-religious speakers, the Establishment Clause is violated. Thus, in Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980), cert. denied, 451 U.S. 987 (1981), the Court agreed (at the ACLU's urging) that the city properly allowed a Papal Mass on public property, but held that the city violated the First Amendment by spending more than $200,000 for platforms for the Mass, religious choir, and other extraordinary assistance.

disclaimer nor the concept of public forum removes the very real danger that members of the public will perceive the display as placing the imprimatur of the state on religion in general, to say nothing of the particular dogma involved. Given the obvious concerns of the Founders, such a danger of appearing to endorse religion justifies, and in some circumstances obligates, a municipality in refusing to turn over its public spaces for such extended religious displays, especially when fully adequate private sites are available.

Thus, although the streets and parks have "time out of mind" been places open to the exercise of free speech, Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J.), surely the dominant churches in every city, village and hamlet throughout the nation may not compel, on free speech grounds, their towns to display large lighted crosses in

public squares and parks at the center of town. To put it another way, the Establishment Clause precludes American cities from being forced to emulate Rio de Janeiro's public statue of Christ atop Sugarloaf Mountain. Where, as here, religious adherents eschew available private spaces for their display and, instead, insist upon displaying religious symbols for an extended period of time on public property not subject to a variety of complementary secular uses, the perception (and, as the district court found, the intention Pet. App. 57a,) is not one of fostering free exercise, but rather of insisting upon an appearance of public endorsement.

The line between religious speech that is absolutely protected by the Free Speech Clause and religious speech that is subject to this minimal degree of regulation to avoid violating the Establishment Clause is

undoubtedly a subtle one. However, the adoption of subtle lines is necessary to preserve both sets of values embedded in the Establishment and Free Speech Clauses of the First Amendment.

On the record in this case, the line is not difficult to draw. Indeed, were Scarsdale to have permitted the display, it would have violated the Establishment Clause.

First, the display is avowedly and unabashedly sectarian. Unlike the display at issue in Lynch, no argument exists that the Scarsdale display is merely part of a general attempt to celebrate the holiday season by exhibiting its many symbols. The Scarsdale nativity scene stands unadorned by any secular trappings. Cf. Lynch v. Donnelly, supra.

Second, the subjective intention of the respondents is to convey a sectarian message. It is the very purpose of the

display to remind the residents of Scarsdale that, despite governmental recognition as a national secular festival, Christmas remains a Christian holiday.

Third, respondents' decision to insist upon a public platform for the creche, despite the existence of numerous private alternatives, is an attempt to assert the official status of Christmas as a national holiday of Christian dimensions; not merely a secular celebration of shared Western values.

Fourth, the proximity of the creche to Scarsdale's War Memorial, a public monument erected and maintained by the Village, powerfully reinforces the risk of an appearance of governmental endorsement of the creche's sectarian message.

Fifth, the dearth of contemporaneous secular events utilizing the public land in question increases the risk of an appearance of endorsement. Unlike the numerous

contemporaneous secular uses which surrounded the religious speech in Widmar and the contemporaneously displayed secular objects in Lynch, respondents' display stands alone, thus increasing the danger of public equation of extended presence with endorsement.

Sixth, the existence of numerous obvious alternative private sites increases the danger of an appearance of government endorsement. Unlike Widmar and O'Hair, where no alternative private sites existed, the use of public land for an extended religious display cannot be explained as a neutral act of toleration. Rather, it will be perceived by many -- indeed, respondents hope that it will be so perceived -- as an expression of government support for religion.

Seventh, the unfortunate history of religious polarization in Scarsdale over the issue of whether to permit the creche makes it clear that a substantial segment of the

community, both for and against the display, views the decision whether to permit it as an indication of government support for the religious message involved. Unlike the situation in Lynch, the creche issue had divided Scarsdale on religious lines for over a decade before the Village trustees sought to end the division by transferring the display to private premises, and well before this litigation commenced.

Eighth, the lack of pre-existing rules and regulations in Scarsdale governing access to public land for free speech purposes renders the decision to permit or to deny the display an ad hoc exercise in subjective decision-making, making it all the more likely that a decision to permit the creche would be viewed as an expression of government support for its message. Were areas of Scarsdale's parks set aside as genuine public fora and utilized as such by

the community, the danger that a religious display, as one of a multitude of contemporaneous secular uses, would be perceived as an endorsement would be materially decreased.

Ninth, the size, duration, and timing of the display, coupled with the lack of a meaningful disclaimer,[5] exacerbated the risk that members of the public would view the display as a government endorsement of the Christian version of Christmas.

Moreover, the decision to ban the display frees Scarsdale from the very difficult question of whether simultaneous and divisive private displays of other sects' religious symbols -- to say nothing of

[5] The display at issue in this case stands in the midst of a traffic circle and is designed to be viewed from an automobile. Moreover, the display is lit and is designed to be viewed at night. While it is doubtful that any disclaimer would be sufficient to eliminate the appearance of endorsement, surely an unlit sign which is not visible from a passing automobile was insufficient.

displays by agnostics and atheists -- must also be permitted.

In view of the confluence of these factors and given the need to accommodate both Establishment and Free Speech values, Scarsdale's decision to confine the display to equally prominent private spaces was not only a permissible exercise of power; it was a required one.

CONCLUSION

For the above-cited reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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No. 84-277

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IN THE

Supreme Court of the United States

October Term, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

vs.

KATHLEEN S. McCREARY, DAVID DRABKIN, ANN F. CRAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Question Presented

Whether a municipal governing board acts consistently with both the Establishment Clause and the Free Speech Clause of the First Amendment when it refuses to allow a Creche to be placed in a small public park for approximately two weeks of the Christmas season.

Statement of Interest

The American Jewish Committee (AJC) and the National Council of the Churches of Christ in the U.S.A., as *amici curiae,* respectfully submit this brief supporting reversal of the decision below.

The American Jewish Committee, a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in a pluralistic society.

In the view of AJC, municipal acceptance of a Creche on public property represents official endorsement of a religious message that Jews do not accept and reflects invidiously on Jewish religious beliefs and on the status of Jews in the political community. In the view of AJC, a Creche, which depicts the birth of Jesus as the birth of a divinity is unmistakably and unalterably religious, indeed doctrinal, in nature. The placement of such a Creche in a Scarsdale public park over a two week period, not as part of some more secular or commercial display, but for the purpose of promoting its religious content, would have been tantamount to state acceptance of a particular religious

doctrine, and the Scarsdale Trustees thus acted well within their rights in refusing to permit such a display. AJC would feel the same with regard to the acceptance by municipal authorities of a menorah or any other religious symbol. The First Amendment is equally contravened by the long-term display of an inherently religious symbol standing alone, whatever the religion involved.

The National Council of the Churches of Christ in the U.S.A. is the cooperative agency of thirty-one national religious bodies in the United States having an aggregate membership of over 40,000,000. The Council does not presume to speak for all of those adherents but for its Governing Board, the body of some 280 members appointed by the several member denominations in proportion to their size and their support of the Council.

In the view of the National Council of Churches, the municipal acceptance of a Creche on public property not only degrades and secularizes a sacred symbol of Christianity, but also represents either a presumptuous identification by government with that religion and its symbols or an equally presumptuous identification by Christians of their religious traditions with the institutions of government. A municipality acts well within its prerogatives when it declines to accept on public property such an affront to non-Christian citizens. Religion has been, is, and must continue to be a vital, vigorous and legitimate element in American public life; but that should be effected, not by state action, but by citizen action within the private sphere. There are many ways in which citizens, individually and in voluntary private groups of their own choosing, can express their religious views, commitments, symbols and aspirations without employing or seeking to employ the machinery and passive sponsorship of the state for their free exercise of religion.

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Constitutional Provisions:

First Amendment, United States Constitution ..... *passim*

No. 84-277

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THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This brief is submitted with the consent of the parties.

Statement of the Case

Amici incorporate by reference the Statement of the Case set forth in the petitioners' Petition for a Writ of Certiorari. The opinion of the Court of Appeals, No. 83-9052, slip. op. (2d Cir. June 21, 1984), has not yet been reported. The opinion of the District Court is reported at 575 F. Supp. 1112 (S.D.N.Y. 1983).

Summary of Argument

Religious Americans of both Christian and non-Christian persuasions recognize that in a pluralistic society the key to the free and robust exercise of religion lies in a strict separation of church and state. The Constitution sets forth the minimum legal requirements for maintaining this policy; but it in no way prohibits local governments from taking reasonable additional measures to further this policy even when such measures are not compelled by the Constitution.

It was not unreasonable for the Board of Trustees of the Village of Scarsdale to conclude that the placement of a large depiction of the Christian Holy Family, unaccompanied by secular images, in a small public park frequented by Christians and non-Christians alike would not only give offense and inflame religious sensitivities but would undermine the neutrality of government toward religion essential to the maintenance of harmony in this multi-religious community. This decision may well have been mandated by the Establishment Clause of the Constitution; for here there were present none of the secularizing components, such as related displays of Santas, reindeer, and commercial images,

that led the Court to conclude, in its close and narrow decision in *Lynch* v. *Donnelly,* 104 S. Ct. 1355 (1984), that the erection of a Creche with public support in the City of Pawtucket was not, in context, unconstitutional. But even if *Lynch* is interpreted as *permitting* the Scarsdale Trustees to authorize erection of a Creche in the public park, nothing in *Lynch* can be read as *compelling* such a result or as depriving the Trustees of reasonable discretion in determining what displays are offensive to local sensibilities and disruptive of the Village's policy of pluralistic harmony.

Nor is the freedom to exercise such discretion, within reasonable limits, in any way prohibited by the Free Speech Clause as interpreted in *Widmar* v. *Vincent,* 454 U.S. 263 (1981). A large religious symbol dominating a small public park over a period of two weeks is considerably more than, if not altogether different from, the kind of constitutionally-protected speech at issue in *Widmar,* such as religious talks, prayers, and other forms of temporary oral expression. Even as to these latter forms of speech, *Widmar* does not preclude some opportunity for the exercise of discretion appropriate to local conditions.

In such a sensitive area, delicate balancings responsive to local conditions ought to be encouraged. The broad mandates of the Constitution do not dictate every such balance; rather, they provide a framework within which it is left to local officials to work out suitable accommodations. The determinations of the Scarsdale Trustees were well within this framework and ought to have been left undisturbed by the Court of Appeals.

ARGUMENT

Governmental Refusal to Allow the Erection of a Creche on Public Park Land is Wholly Consistent With, if Not, Indeed, Compelled By, the Establishment Clause of the Constitution and Does Not Offend the Free Speech Clause.

When the Framers of the Constitution mandated that "Congress shall make no law respecting an establishment of religion," their purposes were "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other"[1] and to ensure that government maintain a position of "neutrality" with respect to religion—neither endorsing nor inhibiting the promulgation and practice of religious beliefs.[2] But the Establishment Clause does not itself prescribe how these policies of separation and neutrality are best achieved in every circumstance. As this Court recognized less than one year ago, "[t]he Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause 'was to state an objective, not to write a statute.'" *Lynch* v. *Donnelly,* 104 S. Ct. 1355, 1362-63 (1984) (quoting *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970)).

To be sure, the Establishment Clause, as elaborated by this Court, sets forth the minimum legal requirements for

1. *Lemon* v. *Kurtzman,* 403 U.S. 602, 614 (1971).

2. *Everson* v. *Board of Education,* 330 U.S. 1, 15 (1947) ("Neither a State nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another"); *Epperson* v. *Arkansas,* 393 U.S. 97, 103-04 (1968); *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 792-93 (1973).

maintaining the requisite separation and neutrality—and, in our view (as set forth in subsection A, *infra*), these minimum requirements compelled the Scarsdale Trustees to refuse permission for erection of the Creche here. But even if such a result were not compelled, we believe (as set forth in subsection B, *infra*) that the Scarsdale Trustees retained discretion to reasonably implement the objectives of the Establishment Clause by refusing such permission and that such refusal did not offend the Free Speech Clause.

A. The Decision of the Scarsdale Trustees Denying Permission for Erection of the Creche Was Required by the Establishment Clause.

It is generally accepted that a Nativity Creche, standing alone, has an obvious "religious and indeed sectarian significance." *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1369 (O'Connor, J., concurring). Its sole and obvious content is the depiction, in adorational terms, of the birth of a divinity in the form of the Infant Jesus. It is hard to think of a doctrine that is more quintessentially religious in nature than that embodied in the Creche. The doctrine of the birth of Jesus is not only central to Christianity but also serves, both historically and theologically, to separate Christianity from other religions.

To be sure, this Court, in its close and narrow decision last term in *Lynch* v. *Donnelly, supra,* held that the erection of a Creche by the City of Pawtucket, as part of a more general secular and commercial Christmas display, did not offend the Establishment Clause, but that was because, in that "context," the purpose and effect of the Creche were substantially secularized. Although some language in

the Court's opinion suggests that by "context" it meant no more than the temporal association of the Creche with the substantially secularized holiday of Christmas, other language in the opinion suggests that the Court's focus was on the physical placement of the Pawtucket Creche in a broader display of indisputably secular images, including Santa Claus, reindeer, bright lights, and the like. As Justice Brennan stated in his dissenting opinion (in which three other Justices joined): "The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a creche standing alone. . . ." *Id.* at 1370.[3]

This "open question" is now before the Court in this case, and we submit it should be answered by holding that, in the absence of some materially secularizing context such as the accompanying displays in *Lynch,* the erection on public property of a large display that is essentially religious, sectarian and doctrinal in nature offends the Establishment Clause. It is noteworthy, in this regard, that the very factors relied upon by this Court in determining that the Creche display in *Lynch* did not violate the Establishment Clause are entirely absent from the present case.

First, in terms of immediate physical context, here there are present none of the secularizing components present in the Christmas display in *Lynch,* which contained a host of secular objects ranging from a Santa Claus to a teddy bear. To the contrary, the Scarsdale Creche was to have

3. The accompanying footnote to this sentence of Justice Brennan's dissent cites, *inter alia,* the district court's decision in the instant case.

stood essentially alone in the small (less than one-tenth of an acre) public park in the Village center.

Second, in terms of broader, historical context, whereas in *Lynch* there was "no evidence of political friction or divisiveness over the creche in the 40-year history of Pawtucket's Christmas celebration," *Lynch, supra,* 104 S. Ct. at 1365, here the issue has been hotly contested in Scarsdale, escalating toward great interdominational discord and acrimony in the community. (See *infra* at pp. 15-18). This is not to say that political divisiveness alone is sufficient to invalidate otherwise permissible conduct. *See Lynch, supra,* 104 S. Ct. at 1364. But in evaluating the "context" in which a Creche is to be viewed, attention surely should be paid to whether a substantial part of the community (in this case, indeed, probably a majority, consisting of both Christians and non-Christians), regards the Creche in question as having a substantially (and offensively) religious object.[4]

Finally, and most significantly, whereas the Nativity display in *Lynch* served the "legitimate secular purpose" of attracting shoppers to a commercial district, the record in this case overwhelmingly supports the conclusion that the primary, if not sole, purpose of the Scarsdale Creche

4. If "context" is to be the talisman for assessing whether a Creche is secular or sectarian in purpose and effect, it becomes appropriate to view the entire historical and social context relating to the Creche and not merely its immediate physical context. As noted, the Creche not only displays an essential event in the origins of Christianity but also represents essential doctrine—the belief in the divinity of Jesus—which first and foremost separates Christianity from other religions. It is because of the fundamentally religious nature of the Creche that the sensibilities of non-Christian Americans, and Christians who are offended by such use of a religious symbol, must be recognized. *Cf. Everson* v. *Board of Education, supra,* 330 U.S. at 8-9.

is religious in nature.[5] With respect to the Creche itself, the Creche Committee respondents concede that the Creche is a "religious symbol" and the Citizens Group respondents admit that "the purpose of the display was to celebrate and express religious convictions." Furthermore, given that the Creche Committee rejected alternative private sites for its display, but was willing to display the Creche at two other public sites, it seems clear that the Creche Committee wished to display the Creche only in a context where its admittedly religious message would receive the benefit of tacit governmental endorsement.[6] This belies any contention that there was a "legitimate secular purpose" for the Scarsdale Creche.[7]

5. Indeed, the Court of Appeals did not so much dispute this as claim that such religious purpose was, in this case, an exercise of free speech and protected on that ground—a claim we deal with in Subsection B, *infra*.

6. *See Goldstein* v. *Fire Department of the Village of Suffern*, 559 F. Supp. 1389 (S.D.N.Y. 1983), holding that the erection of a sign reading "Keep Christ in Christmas" on the front of a municipal firehouse violates the Establishment Clause, since the sign referred to the Christian theory of Christmas, and "created the obvious impression that defendants either were promoting or approving of the theological origins of Christmas." *Id.* at 1391.

7. In her concurrence in *Lynch*, Justice O'Connor specifically referred to certain factors necessary to her holding that the erection of the Pawtucket Creche fulfilled a "legitimate secular purpose":

> . . . I would find that Pawtucket did *not* intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche by celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

Lynch v. *Donnelly, supra*, 104 S. Ct. at 1368 (emphasis supplied). Here, as discussed above, the historical and physical context of the Creche taken together with the Creche Committee's refusal of alternative private sites make clear that the Scarsdale Creche is intended to convey the very endorsement of Christianity which Justice O'Connor held was not present in *Lynch*.

As recently recognized by this Court, Government need spend no money to advance religion in violation of the Establishment Clause: "the mere appearance of a joint exercise of . . . authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason by the power conferred," and therefore may impermissibly advance religion. *Larkin* v. *Grendel's Den, Inc.*, 103 S. Ct. 505, 511 (1982). Indeed, the focus of the Establishment Clause is on the state's endorsement of a particular activity, not on whether the funds used to construct such symbols are public or private. *See, e.g., Stone* v. *Graham*, 449 U.S. 39, 42 (1980); *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962); *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 n. 22 (11th Cir. 1983). In this case the erection of this large, unsecularized Creche, for a two-week period, on a prominent piece of public property, lends an unmistakable aura of Village approval to the display.[8] This is far more than the religious "accommodation" which the Court in *Lynch* stressed could not be avoided. It constitutes a wholly unnecessary, and wholly unsecular, violation of the Establishment Clause.

8. Given the extensive duration, size and unsecularized nature of the Creche, the direction of the Court of Appeals that "an appropriate disclaimer sign or signs" be erected cannot remove this aura of Village approval. Moreover, even if the Court were to find that the Scarsdale Trustees were not *required* to deny permission to erect the Creche, the legitimate question as to the efficacy of such a disclaimer certainly should support a finding that the Trustees were not required to *accept* the Creche either. That there is a legitimate question as to the efficacy of a disclaimer is borne out by the Court of Appeals' finding that the disclaimer sign erected in previous years was "too small" and that court's remand for proceedings in order to determine the "size, visibility and message" of the disclaimer to be erected pursuant to its direction.

B. At All Events, the Constitution Did Not Compel The Scarsdale Trustees To Approve Erection of the Creche.

Even if the Establishment Clause did not flatly require the Scarsdale Trustees to refuse permission for the erection of the Creche in the context of this case (as *amici* believe it does), the Trustees surely had the right to go beyond the constitutionally-prescribed minimum in attempting to implement the policies of separation and neutrality that form the objectives of the Establishment Clause. As Justice White noted in his dissenting opinion in *Widmar* v. *Vincent,* 454 U.S. 263, 282 (1981) (emphasis in original):

> The Establishment Clause . . . sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is *required* to do.[9]

The record here speaks eloquently to the fact that the Scarsdale Trustees, in attempting to achieve harmony within their own community and a balance between the competing objectives of the Establishment Clause and the Free Speech Clause as applied to the peculiar circumstances of this case, acted reasonably and responsibly in coming to the conclusion that the Scarsdale Creche ought more appropriately to be erected on the available private land than on the requested public land.[10]

---

9. Justice White went on to reason: "just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion." *Id.*

10. In so acting, the Trustees were carrying forth the mandate of this Court in *Lynch, supra,* 104 S. Ct. at 1361: "In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court".

For example, the facts developed in the record bear out the reasonableness of the conclusion of the Scarsdale Trustees that the erection of a large adorational Creche, unaccompanied by secular images, in a small public park frequented by Christians and non-Christians alike would not only give offense and inflame religious sensitivities but would undermine the neutrality of government with respect to religion that is essential to the maintenance of harmony in a multi-religious community. As early as 1960 the American Jewish Congress expressed its concern to the Scarsdale Trustees over the placement of a "religious display on public property;" its letter to the Scarsdale Board of Trustees stated: "[w]e, as members of the Jewish faith, find religious display[s] natural and acceptable on church property, but are distressed by them when they appear in a public place shared by all residents of our community." The letter requested that the Scarsdale Trustees "safeguard the neighborly feeling in our community by arriving at a decision which will strengthen the American principle of separation of Church and State." The letter was followed by an increasing volume of protest, response, study, and division among the Trustees. The statements of the Trustees who abstained or voted to deny the Creche application post-1972 indicate that these trustees were concerned that approval might violate either the letter or the spirit of the constitutional prescription that government must remain neutral with respect to religion.

Later, in recognition of the increasing division in the community on the Creche issue, a group of ten members of the clergy from five Scarsdale churches wrote to the Scarsdale Board of Trustees offering their respective church properties, on an annually rotating basis, for dis-

play of the Creche. In making this offer, these clergymen held firm to their commitment to the separation of church and state as the means to ensure religious pluralism and freedom:

> The symbols of religion say different things to different people. A Creche, for example, symbolically makes a particular religious statement which is not held by all.
>
> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.
>
> This is not to say that religious symbols should not be seen in a community. Homes, media announcements and places of worship can be used by those wishing to call attention to their beliefs. In this way, the religious pluralism and freedom which we enjoy in this country are best served.
>
> Our proposal, therefore, is not to remove the Creche from public view but rather to move the Creche to a location which is not public property.

(Ex. 62, pp. 3-4).

Unfortunately, as noted, this proposal was unacceptable to the sponsors of the Creche. They insisted that it be displayed on public land, or nowhere. In response, the Trustees, by a divided vote, denied application for erection of the Creche.

Viewed in this context, it is apparent that the decision of the Scarsdale Board of Trustees denying permission for

placement of the Creche on public property was wholly consistent with, and reflected a keen understanding of, the Establishment Clause. Yet, according to respondents (and the Court of Appeals), this reasoned and informed decision was itself unconstitutional because it offended (or at least did not give sufficient weight to) the Free Speech Clause of the Constitution. In particular, they claim, this Court's decision in *Widmar* v. *Vincent, supra,* should have compelled the Scarsdale Trustees to approve the erection of the Creche as an exercise of free speech in a public forum.

However, this argument overlooks crucial differences between this case and the free speech cases, including *Widmar*. First, unlike those cases where political speech is involved and only the Constitution's requirements of freedom of speech must be considered, here another Constitutional prescription comes into play—the Establishment Clause. As previously discussed, the Village had a right, if not a constitutional obligation, to take reasonable steps to assure its citizens that it was not promoting or endorsing one sect's religious beliefs. The Scarsdale Trustees did not enact an ordinance declaring the erection of a Creche illegal—they merely concluded that the Creche should not be placed on public land. Such balancing of Establishment Clause objectives against Free Speech objectives was perfectly proper and reasonable.

Second, the activity involved in the erection of the Creche, if "free speech" at all, was certainly of a kind rightly subject to more constraint than the oral expression involved in *Widmar* (which concerned use of a university facility for activities of a self-selecting student religious group). The erection and continuous display of a large

religious symbol over a prolonged period of time in the form of an elaborate and a semi-permanent structure is a form of expression totally different, both in kind and degree, from voluntary gatherings of students to discuss religious matters, or speeches given on public property by those advocating religious ideas. *See Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Saia* v. *New York*, 334 U.S. 558 (1948). The duration of the display, its size and permanence all serve to distinguish the Creche from an instance of transitory speech tolerated by the state and make it more akin to the imposition of official doctrine endorsed by the state.[11]

Thus, this Court's holding in *Widmar* v. *Vincent, supra,* does not compel a contrary result. There this Court held that where a university made its facilities available to a wide spectrum of student groups, the overwhelming majority of which were secular, it also had to make those facilities available to students who, on a voluntary, self-selecting basis, wished to assemble and discuss religious matters. There the religious students wished no more for their religious discussions than the same rights of access granted to other students for their political, academic, and social pursuits. Here, by contrast, the Creche Committee seeks much more. It did not demand the right to solicit prospective adherents in the park, to distribute religious handbills there, or to set up a podium and speak out—those types of activities for which permission previously had been (and should have been) granted to others. Instead, it insisted upon the erection of a Creche that would be the

11. There is no question that Scarsdale could not erect, or permit the erection of, a church or a permanent altar in Boniface Circle. *Tilton* v. *Richardson*, 403 U.S. 672, 683 (1971).

focal point of Boniface Circle, and not for a matter of hours of a day, but for twenty-four hours for a period of ten days, a major display which would dominate public land and which would have been placed there, rather than on private property, so as to intentionally cause the Village to become a participant in the display. The unquestioned right of the municipality "to establish reasonable time, place, and manner regulations," *Widmar, supra,* 454 U.S. at 276, is alone sufficient to warrant refusal of such a demand.

Nothing in the foregoing should be interpreted so as to suggest that *amici* are not fully committed to the Court's reiteration in *Widmar* that ". . . First Amendment rights are entitled to special constitutional solicitude . . . [requiring] the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content." *Id.* However, in engaging in that scrutiny the Court must balance the constitutionally mandated state interest in maintaining neutrality with respect to religious institutions. For the reasons noted above, we believe strongly that the similarities between *Widmar* and the case at bar are far outweighed by the differences. That the balance was weighed in favor of religious speech in *Widmar* by no means mandates that result in every case, and certainly does not prevent the state from establishing, as it did here (subject, as always, to the Court's scrutiny) "reasonable time, place and manner regulations." *Id.*

If the Constitution and the decisions of this Court are not to become an all-embracing administrative code, reasonable discretion must be accorded to municipalities, and other appropriate governmental authorities, to implement

broad, and in some instances competing, constitutional objectives through carefully considered decisions and balancings attuned to local conditions, experiences, and contexts. The decision of the Scarsdale Trustees to refuse to permit erection of the Creche more than met the standards for such implementation of the Constitution's objectives, and the rejection of that reasonable decision by the Court of Appeals should be reversed.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated: November 29, 1984

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, ET AL., PETITIONERS

v.

KATHLEEN S. MCCREARY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether it would violate the Establishment Clause of the First Amendment for a local community to permit a group of private citizens, at their own expense, to display a nativity scene for a period of approximately two weeks during the Christmas holiday season in a small public park in the center of town.

2. Whether the court of appeals' judgment requiring the Village of Scarsdale to reconsider respondents' application without relying on the Establishment Clause as a basis for denial "compels" the Village to allow the nativity scene.

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INTEREST OF THE UNITED STATES

This case involves two issues of law under the First Amendment. First, does the Establishment Clause *prohibit* the government from permitting private individuals to erect and maintain a stationary religious symbol in a public park, at their own expense, in connection with a religious holiday? Second, does the Free Speech Clause *require* the government to permit erection of such a structure under the circumstance of this case? Both issues directly affect the United States in its capacity as owner of national parks.

National Park Service regulations, 36 C.F.R. 50.19, allow individuals or groups to conduct demonstrations ("demonstrations, picketing, speechmaking,

marching, holding vigils or religious services and all other like forms of conduct which involve the communication or expression of views" (36 C.F.R. 50.19 (a)) in the national parks, and to erect "temporary structures" in connection with such demonstrations "for the purpose of symbolizing a message or meeting logistical needs." 36 C.F.R. 50.19(d)(8); see *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984), slip op. 3. A permit is required for any demonstration involving more than 25 participants or a temporary structure (other than small lecturns or speaker platforms). 36 C.F.R. 50.19(b)(1) and (d)(8)(v). No distinction is made on the basis of the religious, political, or other content of the demonstrations; conflicting applications are granted on a first-come, first-served basis. 36 C.F.R. 50.19(d).

For approximately six and eleven years, respectively, the National Park Service has granted demonstration permits to private groups to erect and maintain, for a several week period during the holiday season, a menorah in Lafayette Park directly across Pennsylvania Avenue from the White House, and a nativity scene on the east panel of the Ellipse. Like petitioners' description of the nativity scene in the instant case, both of these symbols are on public land in prominent locations (cf. Pet. Br. 41-42) and are displayed standing alone, with no immediate secular context (cf. Pet. Br. 42-44). Adoption by this Court of petitioners' argument might well call into question this neutral and established federal practice.[1]

[1] The National Park Service recently decided to include a privately-owned nativity scene in this year's annual government-sponsored Christmas Pageant for Peace, which takes place on public park land (the Ellipse) immediately south of the White House. The practice of including a nativity scene in the Pageant was discontinued in 1973, as a result of *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973). We do not believe that the Court's resolution of the instant case is likely to affect the Park Services's decision, which is similar in most relevant respects to the display by the City of Pawtucket of a nativity scene in its annual Christmas celebration, upheld in *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984).

Petitioners also contend that the court of appeals' judgment has "compelled" the Village "to allow placement" of a nativity scene in a small public park in the center of town (Pet. Br. i). As to this issue, the United States also has a substantial interest. Although, as noted, Park Service regulations generally allow individuals and groups to erect "temporary structures" (such as creches and menorahs) in connection with permitted demonstrations on public park land, we would share petitioners' concern about a *constitutional* rule that would compel the government to allow unattended structures in any location that is otherwise deemed a forum for First Amendment activity.

STATEMENT

1. From 1957 through 1980, the Village of Scarsdale granted the request of a private group ("the Scarsdale Creche Committee") to place a nativity scene in Boniface Circle, a small park in the center of town. The cost of the creche was borne entirely by the Committee, with the exception of electricity for a light bulb in some past years. During the last five years of this period, the Committee was required, as a condition to displaying the creche, to post a sign beside it stating: "This creche has been erected and maintained solely by the Scarsdale

Creche Committee, a private organization" (Pet. App. 34a).

The district court opinion recounts in some detail the other uses of Boniface Circle and other Scarsdale parks by private groups from approximately 1960 to the present. See Pet. App. 28a-29a, 43a-45a. In brief, "most applications for access to Boniface Circle have been denied" (*id.* at 43a (footnote omitted)), usually for reasons related to shopping, traffic, parking, or safety, or for no reason at all; once because of the character of the park as a "War Memorial" (*ibid.*). Other activities that have been allowed in the park include, in addition to Fourth of July and Memorial Day celebrations, only the following: a carnival in connection with the American Field Service Work Day, a kick-off for the Community Fund Drive, and a Christmas Carol Sing sponsored by the Town Club (*id.* at 44a). None of these uses of Boniface Circle involved unattended structures,[2] although unattended symbolic structures have been permitted on public property elsewhere in the Village.

In 1981 and years following, the Village Board of Trustees voted to deny permission for display of the creche on Boniface Circle. The reason for the denial, according to the district court (Pet. App. 46a (emphasis in original)), was the Trustees' belief that "because the symbol was religious it should not be on *any* public land." The court did not specify whether this belief was based on an interpretation of the Establishment Clause or on a general fear that religious symbols on public land would "generate discord in the community" (Pet. App. 46a). Petitioners state that it was both (Pet. Br. 8 (citing minutes of the Board of Trustees)).

[2] The record shows that the Board of Trustees even denied an application by the Red Cross to erect a symbol in Boniface Circle, stating that "it would set a precedent and requests from similar organizations could not reasonably be denied" (Pet. App. 43a n.8).

2. Following denial of the 1982 application, respondents, two private groups that desired to display a nativity scene in Boniface Circle,[3] filed suit in United States District Court for the Southern District of New York, contending that petitioners' denial of their applications violated their rights under the Free Speech and Free Exercise Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth . Pet. App. 27a.

The district court held that Boniface Circle is a "traditional public forum" (Pet. App. 42a) and that the Village's denial of respondents' applications was "content-based"—that is, that the denial was based on the religious character of the proposed display. *Id.* at 46a-47a. The court also held "that the denial could not be upheld as a time, place or manner restriction even if it were content-neutral because it was not issued pursuant to narrowly tailored regulations." *Id.* at 47a (footnote omitted) (citing *Niemotko* v. *Maryland*, 340 U.S. 268 (1951)).[4] However, the district court then held (three months before this Court's decision in *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), that the Village's action in bar-

[3] Although there are two separate groups of respondents, they desire to display only one creche. The "Citizens Group" has stated that it would withdraw its application if the "Scarsdale Creche Committee" is again authorized to display its creche. Citizens Group Br. in Opp. 5 n.2.

[4] The district court rejected respondents' free exercise and equal protection claims. Pet. App. 39a, 60a.

ring the creche was justified by the "compelling state interest" of avoiding violation of the Establishment Clause. Pet. App. 47a; cf. *Widmar* v. *Vincent*, 454 U.S. 263, 270-276 (1981).

The district court acknowledged that allowing placement of the nativity scene would have the legitimate secular purpose of "providing equal access to a public forum" (Pet. App. 51a), and that "entanglement" problems would be insufficient to create an Establishment Clause violation (*id.* at 53a).[5] However, the court reasoned that allowing placement of the creche would violate the Establishment Clause because it would have the primary effect of advancing religion. Unlike religious activities by individuals (such as rallies, sermons, leafletting, or the like), which would be permissible on Boniface Circle (Pet. App. 53a), the placement of an unattended symbol on public land converts the public property from being "just a place from which a message can be proclaimed" to being the actual "message bearer" (*id.* at 55a). Moreover, the court reasoned (*id.* at 56a), in the absence of "persons present to whom the receiver of the religious message can attribute the speech," the possibility is enhanced that the observers "will assume it is supported by the state." The court concluded (*id.* at 61a (emphasis and brackets in original; citations omitted)):

> The line we have drawn allows persons with religious views unfettered freedom to come onto public forum property to *personally* speak those

[5] The court noted that the government would be involved with religion if it granted the applications of religious groups, and also if it were required to determine whether symbols are "religious" for purposes of excluding them. Pet. App. 52a.

> views. We also think it would give them the unimpeded right, subject of course to reasonable time, place and manner restrictions, to bring religious symbols with them. * * * And, we think, it draws a boundary which does not question the right of religion to receive "general [governmental] benefits," but which does allow government not to be "joined" in the promotion of religion.

3. The court of appeals reversed the district court's holding that allowing the nativity scene would violate the Establishment Clause. In reliance on *Lynch* v. *Donnelly*, *supra*, and *Widmar* v. *Vincent*, *supra*, the court of appeals held that to permit a private group to display a creche on public property would not constitute an endorsement of religion. The court "t[ook] care to emphasize the narrowness of [its] ruling," (Pet. App. 24a), stating (*ibid.*):

> we * * * hold only that the Village would not contravene the establishment clause by allowing the display of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season.

The judgment of the court did not compel the Village to grant permission for respondents to put on their display. Rather, the court of appeals remanded to the district court "for the entry of an injunction prohibiting the Village from relying on the establishment clause as a reason for prohibiting the erection of a creche at Boniface Circle" (*id.* at 25a). The court's opinion stressed that its judgment "does not affect the ability of the Village to establish reasonable time, place and manner restrictions regarding

the use of its public properties, including Boniface Circle" (*ibid.*).[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

The most striking aspect of this case is that both sides in the dispute believe that the Constitution (the very same Amendment) not just permits, but compels, the Village of Scarsdale to accept their substantive positions, and deprives the community of all discretion to determine whether or not a private group should be allowed to maintain a creche in Boniface Circle during the Christmas season. Petitioners believe that the Constitution *prohibits* the Village from allowing the creche; respondents believe that the Constitution *requires* the Village to allow it.

A false dilemma has thus been created. The district court began with the premise that, because Boniface Circle is in some ways a "traditional public forum," it follows that respondents have a constitutional right to erect and maintain a structure in that place, unrelated to any actual speech, religious service, or demonstration by individual persons. The court expressly rejected the idea that exclusion of this structure might be justified on the basis of reasonable time, place, or manner regulations. Having thus truncated the Village's discretion to control its property on the one side of the balance, the district court then proceeded to hold that the Village also lacks the discretion to permit an unattended religious symbol on public land. Only because allowing the

[6] The court of appeals also remanded for the purpose of "action regarding a disclaimer sign or signs" and for "other such action as is consistent with [its] determination." Pet. App. 25a.

nativity scene is forbidden, the court reasoned, is it not required.

We submit that the Establishment Clause does not bar the government from granting access to private citizens for erection of a temporary religious holiday symbol, so long as no religious favoritism or discrimination is involved. This was the position of the federal courts even before *Lynch* v. *Donnelly*, *supra*. See *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973). The federal government has followed this approach for ten years, without legal challenge or even formal complaint. Now that this Court, in *Lynch*, has upheld the right of a community to include a nativity scene in a *government-sponsored* Christmas celebration, it is beyond question that neutral accommodation of private groups on public land would also be permissible.

But we submit that it does not follow that the Village of Scarsdale and like governments (including the United States in its capacity as owner of park land) are compelled to grant permission to private persons to erect religious—or any other—symbols, to be displayed, unattended, on any parcel of public land that is available for other forms of First Amendment activity. Nor did the court of appeals so hold.

Contrary to repeated assertions of petitioners (Pet. Br. i, 13, 14, 15, 16, 25, 35, 40, 41, 47, 48), the court of appeals did not "compel," "require," "order," or "command" the Village to grant permission for the creche on Boniface Circle. On the contrary, the court "h[e]ld only that the Village would not contravene the Establishment Clause by allowing the display of a creche at Boniface Circle" (Pet. App. 24a) and expressly observed that the Village could

enforce reasonable time, place, and manner restrictions, as long as these are not content-based (*id.* at 25a). We believe that a neutral distinction between unattended structures and actual speech activities by individuals should be sustained in the context of this small park in the center of town.

A simple affirmance of the narrow holding of the court of appeals would break the false dilemma created by the district court below. The Village has ample discretion under the Constitution to adopt neutral policies for the use of its park, and thereby either to permit or to exclude nativity scenes and similar unattended structures. Reasonable latitude to make these sensitive decisions, of intensely local concern, should be left in the hands of the Village Board of Trustees, which is better able than litigators and courts to forge a locally acceptable solution that accommodates the feelings and interests of the Village citizenry.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT THE GOVERNMENT FROM PERMITTING PRIVATE CITIZENS, AT THEIR OWN EXPENSE, TO USE PUBLIC LAND FOR DISPLAY OF A NATIVITY SCENE DURING THE CHRISTMAS HOLIDAY SEASON

A. The Use Of Public Land By Private Citizens, On A Neutral Basis, For Symbolic Expression Of A Religious Or Political Nature Does Not Imply Government Endorsement Of Their Point Of View

Even before *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), the federal courts recognized the right of individuals and groups, on a neutral and nondiscriminatory basis, to erect and display nativity scenes and similar religious holiday symbols, on a temporary basis and at their own expense, on public land. *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973). Judge Leventhal, concurring in *Allen*, stated that "the Government could avoid all Establishment issues" by treating private organizations that desire to display a creche on public land "like any other applicant for use of parkland" (*id.* at 90).[7] See also *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (upholding a

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[7] The court in *Allen* v. *Morton, supra,* held that government involvement with a nativity scene in the government-sponsored Christmas Pageant for Peace violated the Establishment Clause. In this respect, we believe that *Allen* was effectively overruled by *Lynch* v. *Donnelly, supra.* However, neither in *Allen* nor in any other litigation of which we are aware, until the district court decision below, has it been held that the government is barred by the Establishment Clause from granting permission to a bona fide private group, on neutral terms, to use public land for the temporary display of a religious symbol during the religious holiday season.

National Park Service decision to permit performance of a Papal Mass on the National Mall).

The underlying principle here is that activities on public land are not, and are not generally perceived to be, actions of the government. *O'Hair* v. *Andrus*, 613 F.2d at 934 (when a public park "is, as a matter of established policy, openly available on a non-discriminatory basis * * * to [all comers] (religionists and anti-religionists), there is no 'establishment of religion,' and there cannot be a meaningful perception of one"). Public parks have been used "time out of mind" for purposes of assembly, protest, and communication (*Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (Roberts, J.)); it has never been thought necessary to limit the rights of the people to free speech and assembly on public land merely because some other persons might mistake their activities for government endorsement of a particular point of view.[8] Nor does "the First Amendment protection against forced support or affirmation of repugnant ideas" (Pet. Br. 34) apply to use of public land by individuals for the expression of ideas (however repugnant). Citizens of a town plainly have no First Amendment right—as petitioners contend (Pet. Br. 35)—to prevent speakers with whom they disagree from exercising equal rights of speech and assembly on public land.

In these respects, religious communications are no different from any others. Religious speakers, no less than others, may use public land for the communi-

[8] Cf. *FCC* v. *League of Women Voters*, No. 82-912 (July 2, 1984) (restrictions on editorializing by federally-subsidized public broadcasters held unconstitutional despite Congress's intention "to avoid the apearance of government sponsorship of a particular view or a particular political candidate" (slip op. 6 (Rehnquist, J., dissenting)).

cation of ideas. *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *O'Hair* v. *Andrus*, *supra*. It is inherently no more likely that a privately-placed creche on public property will be viewed as a government endorsement of religion than that a collection of tents in Lafayette Park, called "Reaganville II" and designed to protest the plight of the homeless (see *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984)), would be so confused. But even if it were, the potential for such misunderstanding would not justify exclusion of religious expression from forums otherwise open to all.

To accept petitioners' premise that religious (and other forms of controversial) symbolic speech must be excluded from public parks because of the danger that some observers may infer a government endorsement of the message would convulse modern First Amendment law. It would mean—as petitioners' brief intimates (Br. 19)—that the only ideas that could be communicated on public land are orthodox ideas: those "wrapped in the shared and approving sentiments of the community" (*ibid.*). It would necessitate close administrative and jurisprudential discriminations among forms of symbolic speech, on an essentially standardless basis. We submit that content-neutral rules regarding use of public parks are the best guarantee of First Amendment rights. No special rules are required for nativity scenes or other religious or controversial symbols.

B. That Display Of The Privately-Sponsored Nativity Scene Here Is Permissible Follows A Fortiori From This Court's Approval Of A Government-Sponsored Nativity Scene In *Lynch* v. *Donnelly*

Last Term, in *Lynch* v. *Donnelly*, *supra*, this Court held that a government-owned and sponsored display of a nativity scene, as part of a general holiday cele-

bration, did not violate the Establishment Clause. We believe that decision is controlling here; indeed, the instant case follows a fortiori from the decision in *Lynch*.

Here, unlike in *Lynch*, the nativity scene is privately owned; there is no government sponsorship whatsoever. Whatever concerns there might be that the *government's* display of a creche may communicate a message of endorsement of the Christian religion (see *Lynch*, slip. op. 3-8 (O'Connor, J., concurring)) are absent when the government has played no part (other than to grant permission) in its display. This point is particularly clear here because the creche is accompanied by a sign informing observers that the scene is "erected and maintained solely by * * * a private organization" (Pet. App. 8a)—a safeguard not usually provided in connection with private expression on public land. There is, therefore, far less cause for concern here than there was in *Lynch*.

Petitioners have attempted (Br. 41-47) to distinguish the decision in *Lynch* on four grounds: (1) that the creche at issue in *Lynch* was on private land, while the land here is public; (2) that the Pawtucket creche was part of a larger Christmas display, while the creche here is displayed alone; (3) that the creche display here has engendered actual political divisiveness; and (4) that the Pawtucket officials asserted a secular purpose for their creche display, while the Scarsdale officials here have asserted none. None of these is persuasive.

1. *Public And Private Land.* Petitioners contend that it is significant that the nativity scene at issue here would be displayed on public park land, while the scene in *Lynch* was on private property. However, the opinion for the Court in *Lynch* did not rely in any fashion on the happenstance that the Pawtucket Christmas display was on private land. The Court treated the case, quite properly, as one in which the government was responsible for, and identified with, the display. Moreover, the Court analogized the case to other situations in which acknowledgements of religion take place on public property. Slip op. 16. Considering the full circumstances of the two cases, it cannot seriously be argued that there is greater government involvement with (or appearance of government support for the religious message of) the privately owned nativity scene in Boniface Circle than with the creche in *Lynch*, which was "purchased, erected, displayed, sponsored and owned" by the government (Pet. App. 19a).[9]

[9] Petitioners repeatedly state (Br. 7, 13, 17-18, 21, 32, 42, 45) that respondents' reason for wishing to display the creche in Boniface Circle, rather than on private land, is to create "the appearance of endorsement, an 'aura' of public support" (*id.* at 13) for their religious message. The sole basis for this charge is a statement by the Creche Committee that it did not choose to display the creche on the property of various churches, in rotation, because this would undermine the creche's "ecumenical aspect" (Pet. App. 37a). It seems to us altogether understandable that a multi-faith committee would prefer not to display its nativity scene on the property of a church, where it would appear to belong to *that* church. This is a far cry from attempting to create the impression of government support for their religious views.

In a larger sense, we are concerned that petitioners and the district court have distorted the "purpose" and "effect" inquiries under the Establishment Clause. The important point is that the *government* remain neutral; there is no call for judicial examination into the motives and reasons of private groups desiring to use public park land. The right of the people to use public parks for expressive activity does not

2. *Context.* Petitioners attempt to distinguish *Lynch* on the ground that "[t]he Scarsdale creche has always been presented and displayed standing by itself in Boniface Circle," while the Pawtucket creche was part of a Christmas display including, inter alia, a Santa Claus house, reindeer pulling Santa's sleigh, carolers, a Christmas tree, and a talking wishing well (Pet. Br. 42-43). The court of appeals correctly rejected this purported distinction (Pet. App. 22a-23a).

The contextual distinction drawn by petitioners is one of degree, not of kind. As the court of appeals pointed out (Pet. App. 23a), the Scarsdale creche should be viewed not in isolation, but in the context of the "many traditional symbols of Christmas" decorating other parts of the Village, including Christmas lights and decorations, provided by the Chamber of Commerce, in Boniface Circle itself. Further, as the court of appeals also pointed out (Pet. App. 23a), this Court was concerned less with the particulars of the specific Christmas display in *Lynch* than with the overall "context of the Christmas season" (*Lynch*, slip op. 9). The point is that displaying a traditional symbol of a holiday—even if religious in origin and meaning—does not amount to an endorsement of the religious faith; it is simply a traditional acknowledgement that the holiday is in part a religious holiday.

Petitioners trivialize *Lynch* by claiming that the absence of a cut-out clown, reindeer, or talking wishing well must dictate a different result. The federal courts have more important matters to decide than

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depend upon what are their reasons for not using private land for the same purpose. The court of appeals quite properly treated this line of argument as irrelevant (Pet. Br. 13).

the significance of marginal differences in holiday displays—especially those erected by private individuals.

3. *Divisiveness.* Petitioners attempt to distinguish *Lynch* on the ground that there has been "actual and severe, not merely potential" divisiveness in Scarsdale over the matter of the creche (Pet. Br. 44). However, in this case as in *Lynch*, and for the same reasons, "no inquiry into potential political divisiveness is even called for" (*Lynch*, slip op. 14). See also *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 14-15 n.11. Indeed, in the context of *private* applications for use of public land, the government has an affirmative obligation to protect unpopular speakers, even if their presence on public land is "divisive." In any event, it seems virtually certain that neutral rules for the use of Boniface Circle, such as are permitted under the judgment below (see pages 21-24, *infra*) would more effectively dampen controversy over this issue than would excluding the nativity scene because of its religious message.[10]

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[10] The circumstances of this case provide further support, if any is needed, for the wisdom of this Court's decision not to treat "political divisiveness" as a separate ground for invalidation of practices of this sort. From the beginning of the Scarsdale creche display, the Village leaders have been sensitive to the concerns of the community over the display, forming committees to meet with persons of differing views and entertaining recommendations about how best to handle the matter. See Pet. App. 31a-32a. Until the late 1970s, the Board of Trustees was unanimous in its decisions regarding the creche. In 1976, a resident filed suit, unsuccessfully, to bar the creche (*id.* at 32a), and from that point on, the controversy became both more legal and more contentious.

We can agree that one of the purposes of the Establishment Clause was to defuse religious divisiveness in the political

4. *Official Secular Purpose.* Petitioners observe (Br. 46) that in *Lynch* the Pawtucket officials defended their decision to sponsor a nativity scene on the basis of legitimate secular objectives; here, the Scarsdale officials neither assert nor acknowledge any such purpose. But this is attributable solely to the fact that the Village officials here are opposed to display of the creche. Government officials attempting to justify content-based discriminations among forms of symbolic speech on the ground that to allow religious expression would violate the Establishment Clause should not be allowed to prove their point simply by failing to assert a secular purpose.

Plainly—whether Village officials have asserted it or not—there is a legitimate secular purpose to allowing respondents access to Boniface Circle. Both the district court (Pet. App. 51a) and the court of appeals (*id.* at 16a) so found. To allow citizens to express themselves expands the scope of free expression and communication of ideas; to permit holiday displays promotes the spirit of the season.

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arena; it is not clear that that objective is furthered by removing local disputes to the federal courts and escalating them into constitutional contests. A constitutional rule that opponents of a government decision are entitled to overturn the majority will in the courts, provided there is sufficient "divisiveness" over the decision, would have the effect of stimulating divisiveness, not of reducing it.

II. THE JUDGMENT OF THE COURT OF APPEALS LEAVES THE VILLAGE FREE TO ADOPT NEUTRAL RULES UNDER WHICH IT COULD EITHER PERMIT OR EXCLUDE RESPONDENTS' CRECHE

A. Petitioners Mischaracterize The Opinion And Judgment Of The Court Of Appeals; The Court Did Not "Compel" The Village To Authorize Display Of A Creche In Boniface Circle

Petitioners' first question presented (Br. i) is whether a municipal governing board should be "compelled" to allow placement of a creche in a public park for the two-week Christmas season. They repeat this formulation, with some variation, numerous times in their brief. See Pet. Br. 13, 14, 15, 16, 25, 35, 40, 41, 47, 48. At pages 40-41, they purport to summarize the court of appeals' opinion in three points, the third one of which is (*id.* at 41 (emphasis in original)):

> (iii) Therefore, since Pawtucket's officials were *allowed* in *Lynch* to display a creche, Scarsdale's Trustees are *compelled* under *Widmar* to permit one in Boniface Circle.

This mischaracterizes the court of appeals' judgment and opinion; nowhere in petitioners' brief is the court's actual holding or judgment quoted, or even mentioned. The court's holding is stated at Pet. App. 24a:

> we take care to emphasize the narrowness of our ruling and hold only that the Village would not contravene the establishment clause by allowing the display of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season.

The court's judgment is stated at Pet. App. 25a:

> We remand for entry of an injunction prohibiting the Village from relying on the establishment clause as a reason for prohibiting the erection of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season; for action regarding a disclaimer sign or signs; and for other such action as is consistent with our determination herein.

The court emphasized, also, that the "problem" with the Village's position was only that the prohibition was "content-based," and that its ruling "does not affect the ability of the Village to establish reasonable time, place and manner restrictions regarding the use of its public properties, including Boniface Circle" (*id.* at 24a-25a).[11] In light of this holding and judgment, it is apparent that petitioners have misstated the question presented. The court of appeals did not "compel" the Village to permit the creche on Boniface Circle, but merely required that the Village consider respondents' application without relying on an erroneous legal ground for denial. It is on this basis that we urge affirmance of the judgment below.

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[11] The court of appeals thus rejected the district court's erroneous holding (Pet. App. 47a) that the Village could not defend its decisions on the basis of reasonable time, place, or manner restrictions because the Village had not promulgated "narrowly tailored regulations." A local community is not required to promulgate regulations for the governance of its affairs; it may proceed on a case-by-case basis, provided its decisions are not standardless and are in furtherance of legitimate governmental interests.

B. Under The Judgment Below, The Village May Adopt Neutral Rules That Might, Or Might Not, Exclude Respondents' Creche

Under the judgment of the court of appeals, the Village is free to adopt neutral rules to govern use of Boniface Circle for expressive activities or symbolic speech. Petitioners would be able to make precisely the distinction—between live speech and unattended structures—that they have contended is central to this case (see Pet. Br. 27-31). This commonsense distinction need not be made mandatory on all governments (under either Establishment or Free Speech Clauses); the Village of Scarsdale can, if it chooses, adopt the distinction of its own accord and discretion.

In this respect, we agree with petitioners that *Widmar* v. *Vincent*, *supra*, is not on all fours with this case. In *Widmar*, there was no content-neutral distinction that could be drawn between the activities of the student plaintiffs and the activities of other student groups permitted to meet. The students sought equal treatment within the very terms established by the University to govern the forum. In the absence of an Establishment Clause justification for forbidding religious speech on campus in *Widmar*, therefore, the University was wholly without a reason to disallow it.[12] Here, in contrast, the "speech"—

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[12] This case is also distinguishable from *Bender* v. *Williamsport Area School District*, 741 F.2d 538 (3d Cir. 1984), petition for cert. pending, No. 84-773, for the same reason. In *Bender*, unlike this case, the school officials asserted no reason for denying access to a student religious club other than their lawyers' opinion that to do so would violate the Establishment Clause. See Br. for the U.S. as Amicus Curiae, *Bender* v. *Williamsport Area School District*, No. 84-773. A copy of that brief has been provided to counsel for the parties in the instant case.

display of a creche—is different in kind from any other form of speech permitted by the Village in Boniface Circle. The Creche Committee is the only group ever permitted by Scarsdale to maintain an unattended structure on Boniface Circle for any extended period of time. If the Village chooses to adopt neutral rules that would have the effect of excluding the creche—along with all comparable unattended symbols—from the park, we believe it should be allowed to do so.[13]

A distinction between the live speech activities of individuals and the placement of unattended symbols in a small, open, and uncluttered park like Boniface Circle is surely sustainable as a reasonable time, place, and manner restriction. In *Members of the City Council* v. *Taxpayers For Vincent*, No. 82-975 (May 15, 1984), slip op. 19, this Court distinguished between circumstances in which "individual citizens were actively exercising their right to communicate directly with potential recipients of their message," where the expressive "conduct continued only while the speakers or distributors remained on the scene," and the circumstances of that case, where the petitioners sought to post "temporary signs throughout an area where they would remain unattended until

[13] The Board of Trustees has permitted unattended symbols and structures to be displayed on other public property in the village (Pet. App. 4a), and respondents have indicated their willingness to display the nativity scene in an alternative location (*id.* at 47a & n.12). Given this history, it is apparent that an exclusion of unattended symbols from *all* Village land might be less desirable to the Village and more difficult to sustain as a reasonable time, place, or manner regulation. It is therefore possible that, upon remand and reconsideration of respondents' application by the Board, an agreeable site for the creche, away from Boniface Circle, may be found.

removed." See also *Clark* v. *Community for Creative Non-Violence*, slip op. 8 ("we seriously doubt that the First Amendment requires the Park Service to permit a demonstration * * * involving a 24-hour vigil and the erection of tents to accommodate 150 people").

Such a distinction would serve governmental interests in two important respects, and thus should be sustained in this context as a reasonable time, place, or manner regulation. First, an unattended structure monopolizes space in a way that live people do not; it sits there, unmoving, for as long as it is permitted. This interferes with other potential uses of the park and also injures the park's appearance. Live speakers tend to be more temporary and tend to move about; they are less likely to "appropriate" space for their own exclusive use for an extended period of time. Second, in the absence of individuals engaging in expressive conduct, a fixed, unattended structure may in some contexts be more likely to be viewed as communicating the government's own views. As the district court observed (Pet. App. 56a), if "there are no persons present to whom the receiver of the * * * message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present." The government's legitimate interest in maintaining an appearance—as well as the reality—of neutrality may therefore be advanced by such a distinction.

We agree with petitioners (Br. 27-31) that classification of a parcel of public property as a "public forum" does not end the analysis; the further question is what are reasonable terms for the use of the forum. Although parks, streets, and sidewalks are presumptively "public forums" for certain traditional

activities (speaking, leafletting, or soliciting by individuals) (*Hague* v. *CIO*, *supra*), they should not therefore be considered open for uses that are incompatible with their basic character. No one would suggest that there is a right to erect a billboard in Central Park or to stage a rally in a bird sanctuary. The best indicator of the limits that may reasonably be imposed on access to the forum—in the absence of written policies—are the actual character and historical uses of the location.

Boniface Circle is a small park, with traffic and safety problems, unsuitable for many forms of activity involving crowds or movements of people. The record clearly shows that most requests by private groups to use the park have been denied, for a variety of reasons or for no reason at all. The fact that no private group (other than the Creche Committee) has ever been granted the right to erect and maintain an unattended structure in Boniface Circle for any extended period of time stands as a powerful reason to support the reasonableness and neutrality of a policy barring all unattended structures.

C. Neutral Rules For The Use Of Boniface Circle Would Protect The Village's Legitimate Interests Without Discriminating Against Religious Or Other Controversial Speech

Petitioners begin the discussion (Br. 16) of their argument against being "compelled" to allow the creche with the observation that this issue is one of First Amendment law generally, and only incidentally of the Establishment Clause. This is because petitioners' interests are essentially unrelated to the *religious* character of the proposed display; the Village is equally concerned about other fixed, unat-

tended symbols or structures. As petitioners express the point (Br. 16), the court's analysis

> has resulted in a ruling that today compels [*sic*] the Village to allow a Nativity scene to stand in a park at the Village center, and tomorrow, on the same free speech principle, will compel a place for a swastika, a hammer and sickle, vulgar signs and comparable varieties of symbolic 'speech.'

See also *id.* at 14, 24, 30, 31.

This suggests that the answer to petitioners' perceived problem is not to be found in the Establishment Clause. Even if they were correct that the Establishment Clause prohibits the display of religious symbols of this sort, petitioners would still face the problem of unattended swastikas, hammer and sickles, burning crosses, and so forth. This case does not, therefore, require the Court to grapple with the difficult question of whether the government is ever justified in treating religious expression differently from other forms of expression in order to preserve an appearance of separation of church and state in excess of that required by the Establishment Clause. Pet. Br. 37-39, 47-48; see *Widmar* v. *Vincent*, 454 U.S. at 276; *McDaniel* v. *Paty*, 435 U.S. 618 (1978).

We submit that, under the court of appeals' judgment, neutral rules for the use of Boniface Circle can fully vindicate the Village's legitimate interests.[14]

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[14] To the extent that the Village's interest is in being able to discriminate against some forms of speech within Boniface Circle because of their "controversial," "unsuitable," "repugnant," "objectionable," "contentious," or "hateful" character in the eyes of the majority (see Pet. Br. 14, 16, 19, 20, 25 & n.17, 26, 30, 31, 33, 34 & n.22, 35), that interest cannot constitutionally be vindicated, for it runs counter to First Amendment principles applicable to a public forum.

An evenhanded distinction between unattended structures and live forms of expressive activity would enable petitioners to protect each of the legitimate Village interests they assert in their brief, without the need for discrimination against religious speech. See Pet. Br. 14, 31-39. Since petitioners have acknowledged that it is only the presence of unattended symbols that creates, in their view, an appearance of governmental support for the symbolic message (*id.* at 25, 28) such a distinction would enable the Village to avoid coerced support for sectarian activities (*id.* at 14, 32-35). It would enable the Village to avoid "favoritism, or the appearance of favoritism, toward one sectarian position" (*id.* at 14, 35-37); indeed, neutral rules would perform this function far better than would petitioners' own position that religious speech can be singled out for different—*i.e.*, disfavored—treatment. The same holds true for petitioners' professed interest (*id.* at 14, 37-39) in "steering clear of an Establishment Clause violation in 'letter or spirit.'" Attempting to decide which symbols are "religious"—and which are "wrapped in the shared and approving sentiments of the community" (*id.* at 19)—would entangle the Village in religious determinations far more profoundly than would administration of a neutral system. See *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Cantwell* v *Connecticut*, 310 U.S. 296 (1940).

Neutral principles would thus serve the Village's interests better than petitioners' proposed solution of allowing (or compelling) the Village to discriminate among park usage requests on the basis of the religious content of their speech. Neutral principles would provide a means for dealing with other, non-

religious, forms of symbolic speech—swastikas, burning crosses, and the like—that the Village finds equally troubling. Neutral principles are also far less likely to run afoul of the Constitution. To treat religious expression by private individuals differentially necessarily raises concerns under the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, as well as the Equal Protection strictures of the Fifth and Fourteenth Amendments. This Court has rejected every attempt by government, to date, to relegate religious speech by individuals to a disfavored status, despite the fact that in every such case it could be argued that to do so would enhance the Establishment Clause value of separation between church and state. See, *e.g.*, *Widmar* v. *Vincent*, *supra*; *McDaniel* v. *Paty*, *supra*; *Niemotko* v. *Maryland*, *supra*; cf. *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Petitioners do not make a strong case for entering those perilous waters.

Since neutral time, place, and manner restrictions would fully vindicate the Village's legitimate interests, there is no need in this case for an expansive interpretation of the Establishment Clause, or for a doctrine permitting the Village to discriminate on the basis of the religious content of proposed displays. The judgment below is fully responsive to the Village's concerns, and leaves primary discretion to control the uses of the park to the Village Board of Trustees, where it belongs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

No. 84-877

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

—and—

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS THE SCARSDALE CRECHE COMMITTEE, *et al.*

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The Questions Presented

1. Does the Establishment Clause prohibit the temporary display of a privately-sponsored creche in a public park in the context of a municipality's observance of the Christmas holiday season? *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984).

2. Is a municipality, having no time, place or manner regulations governing the use of its parks, and having freely granted access to its parks for other unattended symbolic displays, required to grant access for the creche? *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

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IN THE
Supreme Court of the United States
October Term, 1984

No. 84-277

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,
Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

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THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS THE SCARSDALE CRECHE COMMITTEE, *et al.*

Statement of the Case

Each of the seven individual members of Respondent The Scarsdale Creche Committee represents a Protestant or Catholic church in the Scarsdale area. During each Christ-

mas season from 1957 to 1980, the Creche Committee displayed its privately-owned nativity scene for approximately two weeks in Boniface Circle, a small park in the center of Scarsdale's retail business district (Pet. 6a, 7a, 28a, 29a; Stip. Ex. 1).* As the District Court found, Boniface Circle is a "traditional public forum" (Pet. 42a, 45a, 11a) and for many years, one of its primary uses has been as a "locus for Christmas celebration" (Pet. 29a, 44a, 5a, 6a).

Each year, the Creche Committee has sought and obtained the permission of the Village's governing body, the Board of Trustees, to display the creche (Pet. 29a-30a; J.A. 33-34). No Village ordinance or regulation prohibits the display of symbols, signs or billboards on Village-owned property, and there is no Village ordinance or regulation which provides standards of any sort for dealing with applications for the use of Scarsdale's parks (Pet. 3a-4a, 28a; J.A. 45). All is left to the discretion of the Village's seven trustees (*Id.; see, e.g.*, J.A. 50-65).

In 1976, the Village's grant of permission for display of the creche was conditioned upon the posting by the Creche Committee of a sign which read, "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization" (Pet. 8a; J.A. 36-37, 122-23). The Committee posted such a sign beside the creche each year thereafter (*Id.*). While the sign's language was imposed by the Village Trustees, the Village did not specify the size of the sign (J.A. 37) and never once complained in the five years that it was posted that the sign was too small or too inconspicuous.

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* "J.A." refers to the Joint Appendix, "Pet." to the Appendix to the Petition for a Writ of Certiorari, "Stip. Ex." to exhibits included in the District Court record, and "Pet. Br." to petitioners' brief.

In the 24 years that the Creche Committee was allowed to display its creche at Boniface Circle, the Committee neither solicited nor received any public funds or assistance in connection with the storage, erection, display or removal of the creche (Pet. 7a, 29a; J.A. 36), except for the trivial expense in some early years of connecting a 40-watt light bulb to a nearby Village light standard (*Id.*).

Until 1981, the Village's position was that the Creche Committee's display of its creche in Boniface Circle "was a part of a traditional celebration of the Christmas season" (J.A. 188), and that by granting permission to a private group for the display, the Village was neither advancing nor promoting religion but was simply treating the Creche Committee like any other local applicant for the use of parkland (J.A. 174, 178, 186, 188).*

However, in 1981 four of the seven Village Trustees yielded to opposition by some residents who complained that the Creche Committee's display was not "neighborly" (J.A. 144, 136), was "offensive" (*Id.*) and was "not congruent with the separation of church and state" (J.A. 145). Reversing a tradition of 24 years' standing, the trustees refused to permit display of the creche in 1981 and 1982 and refused to act upon the Creche Committee's application for Christmas of 1983. Thereupon the Creche Committee brought suit in the District Court.

The District Court found after a trial on stipulated facts and deposition testimony that

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* The Village stated this position in 1977 in opposing a lawsuit which sought to enjoin the Creche Committee's display of the creche. *See generally* J.A. 174-89. The suit was brought by a lawyer associated with the New York Civil Liberties Union (J.A. 199) and was dismissed on procedural grounds. *Rubin* v. *Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1977).

(1) Boniface Circle is a "traditional public forum" (Pet. 42a, 45a, 46a, 11a).

(2) The Village's denial of access was "content-based" (Pet. 46a-47a, 12a).

(3) The reason for denying access was the "feeling that because the symbol was religious it should not be on *any* public land" (Pet. 46a, 12a) (emphasis in original).

(4) Except for respondents, *all* applicants for the use of Boniface Circle were either granted access or were referred to other parts of the Scarsdale park system (Pet. 46a-47a, 4a, 12a).

The District Court found further that in the 26 years reflected in the record, the Village has "freely granted access" to its parks "for the erection of symbols and other three dimensional objects" (Pet. 46a-47a).* Symbolic displays in Scarsdale's parks, unattended by sponsors and often remaining in place for weeks, have included the Red Cross (J.A. 58-59), the Red Cross' banners (J.A. 59), the sword of the Crusade for Cancer (J.A. 61), the rocketship of the Scarsdale Community Fund (J.A. 62), the signs of the United Fund (J.A. 62-63), the signs and banners of the American Field Service (J.A. 59-60), and the Christmas lights and ornaments of the Chamber of Commerce, the Arthur Manor Association and the Village of Scarsdale itself (J.A. 50, 51, 53, 54). Similarly, unattended displays of all sorts—religious and secular—are commonplace in the Village-owned public library (Pet. 4a; J.A. 57-58). The only display ever excluded from Scarsdale's

* Petitioners challenged none of these findings in the Court of Appeals and do not question them in this Court.

parks was the creche and the sole reason for its exclusion was the religious content of the scene it depicted.

While the Village Trustees excluded the creche from Scarsdale's Christmas observance because of its religious significance, the celebration of the holiday at Boniface Circle has not been entirely secular. In 1982, for example, and as has been the tradition in Scarsdale for many years, the Chamber of Commerce hung Christmas lights and ornaments from Village-owned lamp posts located inside Boniface Circle and throughout the area surrounding the park (J.A. 50-51; Pet. 5a). Village employees strung Village-owned Christmas lights on the large evergreen tree growing in Boniface Circle (J.A. 53; Pet. 6a). Christmas music was broadcast throughout the Boniface Circle area for the entire 1982 holiday season (J.A. 50-51). And the annual "Carol Sing," sponsored by a local civic organization, opened with an official welcome from the Deputy Mayor and the traditional arrival of Santa Claus on one of the Village's own fire trucks (J.A. 52).* In this Christmas setting, the carolers proclaimed the birth and divinity of Jesus Christ with such traditional Christmas hymns as *Hark the Herald Angels Sing, O Little Town of Bethlehem, Silent Night* and *The First Noel* (J.A. 52-53; *see generally* J.A. 230-43).

Summary of Argument

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court struck down as violative of university students' First Amend-

* Thus, contrary to petitioners' assertion, the creche never stood entirely alone in Boniface Circle in "sharp, isolated relief" (Pet. Br. 15). As the parties stipulated, the creche stood "for many years" amidst Christmas lights and ornaments strung from Village-owned lamp posts inside the park and throughout the entire surrounding business district and, in 1982, the nearby evergreen tree was decorated with Christmas lights for two and one-half weeks (J.A. 50, 51, 53).

ment right to freely speak their minds a university regulation that forbade the use of university facilities for religious meetings. The key to the decision in *Widmar* was that university facilities were freely available to student groups of all sorts for the expression of all sorts of views. And so here: Scarsdale's parks are freely available to all who seek to use them (Pet. 4a-6a, 19a, 44a, 46a-47a; *see especially* J.A. 50-65).

The difference which petitioners stress between *Widmar* and this case is that here we deal with a religious symbol, albeit a symbol which is traditional in the observance of a national holiday. That difference cannot justify Scarsdale's content-based exclusion, for the display of signs and symbols is not beyond the pale of First Amendment protection. *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490 (1981); *Spence* v. *Washington,* 418 U.S. 405 (1974); *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 308-22 (1974) (dissenting opinion).

This Court's mandate in *Widmar* compelled the issuance of an injunction. While the governing body of a state university has the broadest discretion to govern the affairs of the school, that discretion does not include the power to deny access to campus facilities solely because a proposed use involves religious advocacy, even worship. Similarly, Scarsdale's trustees have no discretion to suppress religious expression in Village parks which are freely available to all who seek to use them. The village park, of course, is the "quintessential" public forum. *Perry Education Ass'n* v. *Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983).

Lynch v. *Donnelly,* 104 S. Ct. 1355 (1984) held that the Establishment Clause is not violated by a city's display of a city-owned creche in the context of the city's Christmas observance. If the city in *Lynch* did not impermissibly advance religion by display of its creche, it necessarily follows that the Establishment Clause would not be offended by the Creche Committee's display of its privately-owned creche in a traditional public forum in the context of a similar Christmas observance.

Thus, under *Widmar* and *Lynch,* and in the absence of any pre-existing and uniformly applied, content-neutral restrictions reasonably related to a substantial governmental interest, Scarsdale's trustees have no right to suppress petitioners' symbolic religious expression in Village parks which are freely available to all others for unattended symbolic expression.

To argue, as petitioners do (Pet. Br. 15), that the "weighty" interests reflected in the Religion Clauses justify suppression of symbolic religious speech is to find in the Religion Clauses a constitutional aversion to religion which would qualify freedom of speech where religion is concerned. The First Amendment cannot be so read. The Religion Clauses give government no more power to abridge the freedom of speech of religious advocates than of advocates for any other cause.

ARGUMENT

I.

The Village of Scarsdale freely permits the display of symbols in its parks. No compelling state interest permits the Village to ban a creche solely on the ground that it may offend.

Petitioners' brief, with its persistent emphasis upon "unwanted" and "offensive" symbols, community discord and

the alleged intent of the Creche Committee to cram its religious message down the throats of its neighbors, tends to obscure the two relatively narrow issues presented here. It is accordingly appropriate to reiterate those issues:

> 1. Does the Establishment Clause prohibit the temporary display of a privately-sponsored creche in a public park in the context of the Village's traditional observance of the Christmas holiday? *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984).
>
> 2. Has the Village demonstrated any compelling state interest which could justify its content-based denial of access? *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

Bearing in mind those issues, it is a critical fact that, as the District Court found, the Village of Scarsdale has "freely" granted access to its parks "for the erection of symbols and other three dimensional objects" (Pet. 46a-47a). Petitioners did not challenge that finding in the Court of Appeals and do not question it in this Court.

The only symbol ever banned from Scarsdale's parks was the creche and the sole ground for the ban was the feeling on the part of the Village Trustees that "because the symbol was religious it should not be on *any* public land" (Pet. 12a, 46a). The District Court so found (Pet. 46a) and that finding was explicitly sustained by the Court of Appeals (Pet. 12a).

The issue is not, as petitioners assert, whether the Creche Committee has the constitutional right to insist upon Boniface Circle as the site for its creche. The Creche Committee was and remains willing to use Depot Plaza (J.A. 262-64; Pet. 47a n.12), where the creche would be accessible to commuters and other pedestrians, and was willing to display

its nativity scene on a small piece of centrally-located parkland which the Village had proposed deeding to a private foundation for community use (Pet. 47a n.12; J.A. 41, 211, 262-63).* As the District Court found, "The Creche Committee . . . approved 'of displaying the creche at Chase Park because it is centrally located and accessible to pedestrians' . . . and [t]he Village also had reason to know that 'Depot Plaza' would have been an acceptable alternative site" (Pet. 47a n.12). Accordingly, the issue is whether Scarsdale's trustees unlawfully banned the creche from *any* public land *anywhere* in Scarsdale.

All three *amici* argue that the Village's ban was justifiable because the creche has religious significance. Petitioners, however, apparently recognizing that religious speech cannot be singled out for suppression, *McDaniel* v. *Paty*, 435 U.S. 618, 636-42 (1978) (concurring opinion); *Kunz* v. *New York*, 340 U.S. 290 (1951); (*but see* Pet. Br. 15), go much further and argue that *any* symbolic expression may be banned from a traditional public forum if it is "offensive" (Pet. Br. 14), "objectionable" (Pet. Br. 19, 20, 25, 30), "ugly" (Pet. Br. 16, 25), "emotionally significant" (Pet. Br. 19), "partisan" (Pet. Br. 30), "sectarian" (Pet. Br. 30, 35), "disagreeable" (Pet. Br. 14), "repugnant" (Pet. Br. 14, 16, 30, 35), "painful" (Pet. Br. 14, 20), "charged" (Pet. Br. 19), "highly charged" (Pet. Br. 21), "unsuitable" (Pet. Br. 16), "divisive" (Pet. Br. 25), "unwanted" (Pet. Br. 27) or "otherwise unacceptable" (Pet. Br. 25).

That argument necessarily assumes that symbolic expression is not protected by the First Amendment. Otherwise

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* The "Heritage Plaza" project was aborted by the opposition of the American Civil Liberties Union, an *amicus curiae* here, which threatened litigation and a "very large and ugly" floor fight in the New York State Legislature (J.A. 41, 216).

the argument would stand the First Amendment on its head, for it is an unquestioned principle that the speech most worthy of constitutional protection is the speech that "stirs people to anger," *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949), and that "offensiveness" is " 'classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment.' " *Bolger* v. *Youngs Drug Products Corp.,* 103 S. Ct. 2875, 2883 (1983), *quoting Carey* v. *Population Services International,* 431 U.S. 678, 701 (1977); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971); *Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576, 592 (1969).

In any event, petitioners' implicit assumption is false: symbolic displays are *not* beyond the First Amendment's pale.

A. The First Amendment protects symbols and signs not attended by their human proponents.

There can be no doubt that communication by signs and symbols enjoys the protection of the First Amendment. *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490 (1981) (billboards); *Spence* v. *Washington,* 418 U.S. 405 (1974) (flag hung outside apartment window); *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969) (black armband); *Stromberg* v. *California,* 283 U.S. 359 (1931) (red flag).

Symbolic expression is not stripped of protection simply because it is unattended by human proponents. In *Metromedia,* for example, the fact that billboards are "large, immobile and permanent structure[s]," 453 U.S. at 502, and unattended, did not prevent the Court from striking down a local ordinance that distinguished between permissible and impermissible signs on the basis of content. Likewise, in *Members of the City Council* v. *Taxpayers for*

Vincent, 104 S. Ct. 2118 (1984), the Court would not have gone to the trouble of determining whether an ordinance prohibiting the posting of signs on utility poles was content-neutral and supported by a substantial governmental interest, if such signs were unprotected communication.

And so if buses and rapid transit cars are public forums, a municipality may not ban political placards at the same time that it permits commercial advertisements. *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 308-22 (1974) (dissenting opinion). As Justice Brennan said for the dissenters in that case,

> In my view, the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content. 418 U.S. at 310.*

Petitioners cite *Clark* v. *Community for Creative Non-Violence,* 104 S. Ct. 3065 (1984) and *Members of the City Council* v. *Taxpayers for Vincent,* 104 S. Ct. 2118 (1984) for the proposition that the right to communicate in a traditional public forum does not include the right to temporarily display unattended symbols (Pet. Br. 28). Those cases hold no such thing. In *Taxpayers for Vincent,*

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* *Accord, Lebron* v. *Washington Metropolitan Area Transit Authority,* No. 84-5189 (D.C. Cir. December 14, 1984); *U.S. Southwest Africa/Namibia Trade and Cultural Council* v. *United States,* 708 F.2d 760, 764-68 (D.C. Cir. 1983); *Planned Parenthood Association/Chicago Area* v. *Chicago Transit Authority,* 592 F. Supp. 544 (N.D. Ill. 1984); *Coalition for Abortion Rights and Against Sterilization Abuse* v. *Niagara Frontier Transportation Authority,* 584 F. Supp. 985 (W.D.N.Y. 1984).

the Court explicitly found that the existence of a public forum had not been established. 104 S. Ct. at 2134. And the issue in *Clark* was not whether the homeless had a First Amendment right to erect symbolic tents, out rather whether overnight *sleeping* in Lafayette Park and the Mall could be regulated by content-neutral time, place and manner restrictions. All that the Court held in *Clark* is that the National Park Service's restrictions on sleeping were "clearly limitations on the *manner* in which the demonstration could be carried out." 104 S. Ct. at 3069 (emphasis added). In neither *Clark* nor *Taxpayers for Vincent* did the Court uphold restrictions on symbolic expression on the ground that there was no right of access to a public forum or that the expression at issue was unprotected.

Regardless of whether there is a right generally to display unattended symbols temporarily in a traditional public forum, if a municipality freely permits such displays, as Scarsdale does, it may not discriminate on the basis of message content. "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Widmar,* 454 U.S. at 267-68.

Petitioners attempt to justify their discrimination on the ground that the symbols they permit are not "sectarian" or "partisan," but are "signs of basic American verities" which are "wrapped in the shared and approving sentiments of the community" (Pet. Br. 31, 19). That is nonsense—and constitutionally pernicious as well.

The nonsense lies in the surprising assertion that all of the statuary in our nation's parks proclaim values that are shared by all of our people. Petitioners apparently forget that memorial statues of the Confederate Soldier adorn almost every county seat of the old Confederacy and that

one of the prides of Richmond is that city's statues of Jefferson Davis, Robert E. Lee, Jeb Stewart and Stonewall Jackson which line Monument Avenue. It is as cynical as it is nonsensical to postulate that symbols such as these are expressions "shared" by the black citizens of the South or by the millions of citizens of the South whose education and upbringing reflect the traditions and values of other parts of the country.

It would more accurate to say of the statuary and symbolic displays which decorate our parks that they are tolerated by our people without notable discord. It is the accuracy of that observation which highlights a basic flaw in petitioners' position: its predicate is regrettable intolerance.

The pernicious aspect of petitioners' argument is the notion that the only permissible displays in our public parks are those that reflect "shared" values and "basic American verities." A notion so unthinkable could not prevail so long as this Court sits.

Few have ever understood the First Amendment to protect only "basic American verities" and "shared sentiments." If petitioners' assertion is valid, then this Court erred when it stated that the First Amendment's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority," *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, 689 (1959), or when it declared:

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound

> unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.* . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. *Terminiello* v. *Chicago,* 337 U.S. 1, 4-5 (1949) (emphasis added) (citations omitted).

The First Amendment does not permit government to protect against "offense" at the cost of suppressing First Amendment expression. *Cohen* v. *California,* 403 U.S. 15 (1971); *Coates* v. *Cincinnati,* 402 U.S. 611 (1971); *Street* v. *New York,* 394 U.S. 576 (1969); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). One traditional value expressed in the Constitution is tolerance and respect for our neighbor's beliefs. *Zorach* v. *Clauson,* 343 U.S. 306, 313-14 (1952); *United States* v. *Ballard,* 322 U.S. 78 (1944). As the Court said in *Ballard,* 322 U.S. at 87,

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.

Petitioners pervert that value by arguing that intolerance justifies the suppression of a traditional Christmas display.

The substance of petitioners' argumentation is that they have the unreviewable discretion to permit a billboard on

public property that entreats gifts to the Red Cross or the Community Fund, but at the same time to ban a billboard fundraising plea by Planned Parenthood if that organization's birth control and abortion clinics are offensive to some who live in Scarsdale. Invidious distinctions of that sort are anathema to the First Amendment.*

The First Amendment does not tolerate conditioning the right to speak upon governmental determinations of what is or what is not religious or offensive, or what is or what is not in the "community interest." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975); *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 150-53 (1969); *Staub* v. *Baxley,* 355 U.S. 313, 322-25 (1958); *Kunz* v. *New York,* 340 U.S. 290, 293-94 (1951); *Cantwell* v. *Connecticut,* 310 U.S. 296, 305-07 (1940). That principle is as applicable to the display of unattended symbols as it is to other forms of expression. *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490 (1981); *Women Strike for Peace* v. *Morton,* 472 F.2d 1273 (D.C. Cir. 1972).

Nor is it any answer to say, as petitioners do, that the Creche Committee could display its nativity scene on private property. This Court rejected that argument some years ago in *Schneider* v. *State,* 308 U.S. 147, 163 (1939), where it stated that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Accord,*

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* *Planned Parenthood Association/Chicago Area* v. *Chicago Transit Authority,* 592 F. Supp. 544 (N.D. Ill. 1984) (Public transit authority violated Planned Parenthood's First Amendment rights when it created a public forum for unattended display advertising but refused to accommodate "controversial" messages about birth control); *Coalition for Abortion Rights and Against Sterilization Abuse* v. *Niagara Frontier Transportation Authority,* 584 F. Supp. 985 (W.D. N.Y. 1984) (same).

Southeastern Promotions, Ltd. v. *Conrad,* 420 U.S. 546, 556 (1975).

Petitioners accuse respondents and the Court of Appeals of treating suppression of the creche on the "crude premise" that all forms of expression are undifferentiated speech governed across the board by rigid and uniform constitutional rules (Pet. Br. 16). That attack is empty hyperbole, particularly since Scarsdale has freely permitted the display of unattended signs and symbols in its parks (Pet. 46a-47a; J.A. 50, 51, 53, 54, 58, 59, 61, 62).

There is no doubt that the constitutional rules governing different methods of communication "must reflect the 'differing natures, values, abuses and dangers' of each *method,*" *Metromedia,* 453 U.S. at 501 (emphasis added), *quoting Kovacs* v. *Cooper,* 336 U.S. 77, 97 (1949), but *content-based* discrimination in any medium of communication is forbidden unless supported by some compelling public interest. We could blind ourselves to all but the law of billboards and bus placards, or the law of the kinds of symbols Scarsdale permits in its parks, and the result would be the same: the First Amendment does not permit Scarsdale to exclude public expression in its parks on the basis of content, to license the Red Cross, yet reject the creche.

We do not suggest that if oral speech is allowed in a particular forum, then *ipso facto* symbolic displays must be permitted there as well. Reasonable "time, place and manner" restrictions are permissible so long as they are justified without reference to the content of the regulated speech, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. *United States* v. *Grace,* 461 U.S. 171, 177 (1983); *Metromedia,* 453 U.S. at 516. The government has legitimate interests in controlling the noncommu-

nicative aspects of any medium, "but the First and Fourteenth Amendments foreclose a similar interest in controlling the *communicative* aspects." *Id.* at 502. The noncommunicative aspects of signs and symbols may be regulated, but only if the regulation

> furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression;* and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Members of the City Council* v. *Taxpayers for Vincent,* 104 S. Ct. at 2129, *quoting United States* v. *O'Brien,* 391 U.S. 367, 377 (1968) (emphasis added).

Here, of course, there are no "time, place and manner" restrictions of any sort—reasonable or unreasonable. As the parties stipulated, and as the District Court stressed, the Village has "no statutes or regulations setting forth guidelines upon which the board bases its decision to grant or deny access, and . . . there are no statutes or ordinances which otherwise set forth guidelines as to how and when Village property may be used" (Pet. 28a; J.A. 45). In Scarsdale, all is left to the discretion—"subjective kinds of evaluations" (J.A. 306)—of the Village's seven trustees.* Scarsdale excluded the creche while freely permitting temporary displays by others. Suppression was entirely content-based and except for the Establishment Clause, the only

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* "In the instant case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice,' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. . . . The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for

governmental interest suggested by petitioners is the constitutionally impermissible desire to suppress expression that would be unwanted, controversial or offensive to some segment of the population.*

In these circumstances, Scarsdale's denial of permission to display the creche offends the Free Speech Clause of the First Amendment. Moreover, since Scarsdale has no regulation whatsoever governing the time, place or manner of the display of symbols in its parks, the record here does not permit exploration of the circumstances under which displays may be restricted.

B. The Creche Committee's display did not constitute governmental endorsement of any religious or controversial message, and did not compel anyone to affirm or endorse any belief.

It is a persistent theme of petitioners' brief (Pet. Br. 13, 17-18, 32, 42) that the Creche Committee insisted upon public land for display of the creche for the purpose of conveying the false impression that the Village endorsed the creche's religious message. That argument is both constitutionally irrelevant and factually incorrect. What matters here is that since Scarsdale has no "time, place or manner" regulations and has freely permitted unattended symbolic displays in its parks, the Creche Committee—like any other

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or disagreement with the [appellants] or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." *Niemotko* v. *Maryland*, 340 U.S. 268, 271-72 (1951).

* Petitioners assert that Jews comprise the largest ethnic group in Scarsdale and constitute roughly 50% of the total number of families. The assertion is not supported by the record and is, in any event, irrelevant. It would make no constitutional difference that those who oppose the display of the creche are either an overwhelming majority or a small minority.

group in the Village—has the constitutional right to display its creche.

(1) The alleged intention of the Creche Committee is constitutionally irrelevant. This Court has never permitted the suppression of protected speech—be it innocuous or offensive—because of the alleged improper motive of the speaker. It would be disturbing indeed if municipal functionaries were permitted even to inquire into the purpose or motive of those who seek to express their views in a traditional public forum.

We note that in recent years the Vatican has made available Michelangelo's *Pieta* and other precious works of religious art for exhibition in state-owned or state-supported museums throughout the United States. As petitioners would have the Court read the Constitution, the Vatican's generosity would be constitutionally impermissible if it could be established that the real purpose of the exhibition was to proselytize and to convey the false impression that the proselytization was supported and endorsed by the prestige and authority of Washington's National Gallery and New York's Metropolitan Museum.

(2) In any event, the Creche Committee did not intend to convey the appearance of governmental support or to force others to endorse the religious message of the creche. The Committee sought only to express and celebrate its beliefs, and those of its member churches, in a public park.

The Creche Committee originally chose Boniface Circle for its display because it was then the site of Scarsdale's annual Christmas "Carol Sing" (J.A. 261, 269). In 1980, the Committee agreed to display the creche on private property near Boniface Circle (Pet. 9a; J.A. 41, 134, 261-64), but the agreed-upon sites were not made available (*Id.*). When the Village refused to permit display of the

creche in Boniface Circle in 1981, the Committee displayed it across the street on private property, where it was vandalized (J.A. 41, 264, 266). On the understanding that the property abutting the local railroad station was privately owned, the Committee was willing to display the creche there (J.A. 262-64). Similarly, the Committee favored the idea of displaying the creche on centrally-located land which would be deeded by the Village to a private foundation for community use (Pet. 47a n.12; J.A. 41, 262-63). That project was abandoned in the face of opposition by the American Civil Liberties Union (J.A. 216, 41).

Contrary to petitioners' strained interpretation, the message desired by the Creche Committee quite obviously was not that all citizens of Scarsdale shared its members' religious beliefs, *see, e.g.*, J.A. 223-24, but rather that the Committee's sponsoring churches were of different denominations, so that the creche's display was an "ecumenical" Christmas project sponsored by several rather than by just one particular church (J.A. 275-76, 279).*

(3) Regardless of the Creche Committee's intent, the Village's neutral accommodation of a privately-owned creche cannot be deemed "compelled speech" under *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977). In those cases, the Court overturned state statutes that required individuals actually or apparently to affirm as true a particular ideological message. In *Wooley*, for ex-

* The District Court found that the Creche Committee, by describing itself and its member churches' spirit as "ecumenical," *see* J.A. 275-76, 279, 228, intended to convey an appearance of public support for the creche's religious message (Pet. 57a). The Creche Committee challenged that finding on appeal, but the Court of Appeals did not address the question. However, the District Court's finding does not preclude this Court's consideration of stipulated facts and uncontradicted deposition testimony.

ample, the Court found that by punishing persons for covering the state's slogan on automobile license plates, New Hampshire had in effect required its citizens "to use their private property as a 'mobile billboard' for the State's ideological message." 430 U.S. at 715.

In contrast, by permitting the temporary display of a privately-owned nativity scene in an open public forum, accompanied by a sign identifying the sponsor, the Village does not force anyone actually or apparently to affirm the truth of the display's message. No one is compelled to venerate the creche or even to walk by or look at it.* Unlike the situation in *Wooley*, where the message "Live Free or Die" was to be carried by every citizen's automobile, there is no reason here to associate the creche with anyone other than the members of the Creche Committee.

In addition, because Scarsdale's parks are freely available to and used by others to express their individual views, *see, e.g.*, J.A. 50-65, the Creche Committee's message cannot *reasonably* be ascribed to the entire Village. The presence of a disclaimer sign stamps as wholly unreasonable any supposition of governmental support. The fact that the display is unattended does not make more plausible any inference of government support, particularly when the Village freely permits other unattended symbols on public property (Pet. 46a-47a). If the unattended creche in *Lynch*, which was displayed by government and paid for with tax

* *Amicus* The American Civil Liberties Union, without any citations to the record, asserts that the creche was lit and intended to be viewed by automobile passengers at night (Br. 22 n.5). As review of the Joint Appendix and the District Court opinion would have demonstrated, the creche was "unlit altogether" except for a period prior to 1977 when it contained a 40-watt bulb (Pet. 29a), it was intended to be viewed by pedestrians (J.A. 271-72) and, as the District Court found, was "no doubt" intended to be viewed "head-on and from a few feet away" (Pet. 34a).

dollars, did not raise a compelled speech problem, and if, as Justice Rehnquist suggested in *Wooley,* New Hampshire could erect billboards containing ideological messages without being deemed to have compelled its citizens to endorse any message, 430 U.S. at 721, then there is no compelled speech where a municipality merely grants a private group access to a public forum that is available to all.

C. Christmas is a national holiday and the creche a traditional symbol of Christmas.

Petitioners descend to forensic hyperbole by arguing that if they are required to permit the creche, they must likewise permit the burning cross, the swastika and other vile and odious symbols which would sear the sensibilities and torture the soul of Scarsdale (Pet. Br. 13, 14, 16, 24).

It should hardly be necessary to remind petitioners that our sole concern here is the temporary display of a creche in a public park in the context of the Christmas season. We are not concerned here with any other holiday, with any other symbol or with any permanent display of any sort. *Cf. Stone* v. *Graham,* 449 U.S. 39 (1980) (per curiam); *ACLU* v. *Rabun County Chamber of Commerce, Inc.,* 678 F.2d 1379 (11th Cir. 1982), *modified,* 698 F.2d 1098 (11th Cir. 1983).*

Christmas is, after all, a national holiday, 5 U.S.C. § 6103, and the creche is so traditional a symbol of that

* Nor are we concerned here with government's "prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young and impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power and influence of school administration, staff and authority." *Abington School District* v. *Schempp,* 374 U.S. 203, 307 (1963) (concurring opinion). *See Marsh* v. *Chambers,* 103 S. Ct. 3330, 3335-36 (1983); *O'Hair* v. *Andrus,* 613 F.2d 931, 936 (D.C. Cir. 1979).

holiday that it is featured on our country's postage stamps. *Scott Specialized Catalogue of United States Stamps 1984* (62d ed. 1983) 207, 236.

The only symbol ever banned from Scarsdale's parks was the creche. No one has ever sought to burn a cross on Boniface Circle, to erect a swastika there on Hitler's birthday or to proclaim by billboard there that God does not hear the prayers of Jews or of Republicans or of Democrats (Pet. Br. 14, 16, 31, 34). In the unlikely event that Scarsdale's trustees are one day confronted with such a request, it will be time enough to consider then whether they are indeed powerless to protect the villagers against "fighting" words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942); *Gooding* v. *Wilson,* 405 U.S. 518, 523 (1972). That, of course, is not the issue here and no hyperbolic construct can make a "fighting" symbol out of a nativity scene.

II.

The Establishment Clause does not prohibit the temporary display of a privately-sponsored creche in a public park at Christmas.

Analysis of petitioners' objection to the creche suggests that it is bottomed upon a notional view of the Establishment Clause which is repugnant to our nation's history and traditions and totally inconsistent with the decisions of this Court. As petitioners seem to read the Establishment Clause, it requires the pretense that Christmas has no religious content.

It is indeed surprising that such a notion should be advanced after last Term's decision in *Lynch* v. *Donnelly,*

104 S. Ct. 1355 (1984). *Lynch*, of course, likewise dealt with a nativity scene—a symbol so prototypical of Christmas that it appears on United States postage stamps.

This Court in *Lynch* considered a city's display of a creche not only in the context of the Christmas season, but also in the context of our nation's traditions and pluralistic religious heritage. 104 S. Ct. at 1358-61. Our coinage proclaims "In God We Trust," and our one-dollar bills depict the reverse of the Great Seal of the United States. The reverse of the Great Seal confirms our national acknowledgment of a Supreme Being: the Eye of Providence and the motto *Annuit Coeptis*, "He [God] has favored our undertakings." That motto alludes to "the many interventions of Providence in favor of the American cause." * It is difficult to understand how the same Constitution which permits national recognition of a Supreme Being, the depiction of a nativity scene on postage stamps and the engagement of chaplains at public expense by the Senate of the United States, the House of Representatives and state legislatures, *Marsh* v. *Chambers*, 103 S. Ct. 3330 (1983), could prohibit recognition of the fact that the Christmas holiday has religious aspects.

Prior to *Lynch*, in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court struck down a regulation prohibiting student religious groups at the University of Missouri from using facilities that were generally open to all student groups. *Widmar* rests on the constitutional principle that the Establishment Clause does not bar the extension of generally available benefits to religious groups. If that were not so, " 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.' " 454 U.S. at 274-75, *quoting Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 747 (1976). *See also Mueller* v. *Allen*, 103 S. Ct. 3062 (1983); *Everson* v. *Board of Education*, 330 U.S. 1, 16-18 (1947).

* *The Great Seal of the United States* (U.S. Department of State, July 1980) 6, 9.

As the Court of Appeals recognized, the logic of *Widmar* and its predecessors governs here. The Village of Scarsdale, freely granting access to its parks for the temporary display of unattended symbols, would not transgress the Establishment Clause by granting the same access to the Creche Committee on a nondiscriminatory basis. Indeed, before this Court decided *Widmar* or *Lynch*, the Village itself recognized and argued in *Rubin* that its neutral accommodation of the Creche Committee would not offend the Establishment Clause. J.A. 174-89. The Village was entirely correct: the Establishment Clause provides no compelling state interest in excluding the creche from Scarsdale's parks.

Petitioners strenuously object that the Court of Appeals engaged in a "remarkable stretching" of *Widmar* because the exclusion there applied to live speakers, whereas the creche is an unattended symbol (Pet. Br. 13). They argue first that the Free Speech Clause does not protect communication through such symbols. As discussed earlier, that argument has no merit.

The Village also asserts that while permitting use of a public forum for religious speech does not violate the Establishment Clause, accommodating a temporary creche display does, because it results in the placement of an "imprimatur of State approval on religious sects or practices" (Pet. Br. 26). That argument is disposed of by this Court's decision in *Lynch* that a city could itself constitutionally maintain and display a creche at Christmas. As the Court of Appeals correctly reasoned,

> If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the Village's

> neutral accommodation herein to permit the [private] display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause (Pet. 19a).

Petitioners struggle to distinguish *Lynch*, but their supposed distinctions are insubstantial.

The public land/private land distinction has no merit. If the Establishment Clause is not offended when a municipality *actually* sponsors a creche, it cannot be offended merely because a municipality *might appear* to sponsor one. In any event, there was no such appearance here, where a disclaimer sign identified the private sponsor, the Village's non-endorsement of the creche received wide publicity (*see* Pet. 22a), and the Village's parks are freely available for unattended displays and other uses by other private groups. Under such circumstances, as the Court of Appeals concluded, "no *reasonable* person will draw an inference that the Village supports any church, faith or religion associated with the display of a creche during the Christmas season at Boniface Circle" (Pet. 22a) (emphasis added).*

The Village argues erroneously that the creche was permissible in *Lynch* only because it was surrounded by reindeer, teddy bears and the like. But this Court held in

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* *See also Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 321 (1974) ("The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board.") (dissenting opinion) (citation omitted); *cf. O'Hair* v. *Andrus*, 613 F.2d 931, 934 (D.C. Cir. 1979) (erection of Papal altar and conduct of Papal Mass on National Mall is constitutionally permissible, for where public property is openly available to all, "there is no 'establishment of a religion,' and there cannot be a meaningful perception of one").

Lynch that "the focus of our inquiry must be on the creche in the context of the Christmas season." 104 S. Ct. at 1362. *See id.* at 1358. The constitutional focus was not upon a head count of Pawtucket's reindeer and teddy bears. The Court concluded that

> To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted overreaction to our history and to our holdings. *Id.* at 1365.

Here, too, the focus must be the creche in the context of Scarsdale's observation of the Christmas season.

For the entire month of December, Christmas is celebrated in Scarsdale's parks and streets. The Chamber of Commerce and the Arthur Manor Association display (with Village permission) Christmas lights and ornaments on Village-owned light standards and trees in Boniface Circle and Davis Park (J.A. 50-51, 53-54). The Village permits the Chamber of Commerce to pipe in recorded Christmas music in the decorated Boniface Circle area for the entire month of December (J.A. 50-51). The Village itself decorates Christmas trees at Village Hall (J.A. 53).

Christmas carols are sung in Boniface Circle on Village-owned platforms and amplified by Village-owned loudspeakers (J.A. 50-51; Pet. 44a-45a) before an evergreen tree now decorated with Christmas trimmings by the Village (J.A. 53). Santa Claus arrives on one of the Village's fire trucks (J.A. 52). The carolers sing not only ***Rudolph The Red-Nosed Reindeer***, but also devotional Christmas hymns which celebrate the birth and divinity of Jesus Christ (J.A. 52-53, 231-37).

Neither logic nor a sense of our nation's pluralistic history and tradition requires the Village to prohibit the Creche Committee from temporarily displaying its creche—a traditional Christmas symbol—in the same public park in which carolers sing

> O COME ALL YE FAITHFUL,
> JOYFUL AND TRIUMPHANT
> O COME YE, O COME YE TO BETHLEHEM!
> COME AND BEHOLD HIM, BORN THE KING
> OF ANGELS!
> O COME LET US ADORE HIM,
> O COME LET US ADORE HIM
> O COME LET US ADORE HIM, CHRIST,
> THE LORD! (J.A. 233; *see* J.A. 231-40).

As the Court of Appeals said of Scarsdale's Christmas celebration,

> the Christmas celebration in the Village is not significantly different than the Christmas celebration described in *Lynch*. In Scarsdale, the Village is decorated with many traditional symbols of Christmas. Moreover, Boniface Circle has been the recent site of the Christmas Carol Sing and the site of numerous Christmas decorations (Pet. 22a-23a).

Petitioners' "divisiveness" argument must be considered almost frivolous in light of *Lynch*, where the Court said that "no inquiry into potential political divisiveness is even called for" in cases that do not involve a direct subsidy to church-sponsored schools or other religious institutions, 104 S. Ct. at 1364-65, *citing Mueller* v. *Allen*, 103 S. Ct. 3062, 3071 n.11 (1983), and Justice O'Connor wrote that "divisiveness" should not be an independent test of constitutionality, 104 S. Ct. at 1367. Moreover, "divisiveness" can

never justify the suppression of individual religious expression. As Justice Brennan said in *McDaniel* v. *Paty*, 435 U.S. 618, 640-41 (1978), where Tennessee sought to invoke "divisiveness" to bar a clergyman from public office,

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. . . . Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. . . . [The Establishment Clause] may not be used as sword to justify repression of religion or its adherents from any aspect of public life (concurring opinion) (citations and footnote omitted).*

As a last resort, petitioners contend that even if the Establishment Clause does not dictate that they *must* exclude the creche, they nevertheless *may* do so. That contention directly contradicts the command of the Free Speech Clause that "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972); *see also Widmar*, 454 U.S. at 267-70.

Petitioners apparently overlook this Court's mandate in *Widmar*, which necessarily directed the issuance of an

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* *See also United States* v. *Ballard*, 322 U.S. 78, 87 (1944); Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980).

injunction against the university's officials, an injunction which could leave no room for the exercise of discretion. Just as the University of Missouri had no discretion to deny the use of campus facilities for religious expression, Scarsdale's trustees have no discretion to deny the Creche Committee access to the Village's parks, particularly since they freely grant access to all others.

The Village's purported interest in "avoiding even near approaches to collisions with the Establishment Clause" (Pet. Br. 32) cannot override the guarantees of the Free Speech Clause. In *Widmar,* for example, the state urged that its discriminatory exclusion of religious speech from a public forum was justified by a compelling interest in protecting against a violation of the Missouri Constitution, which allegedly went further than the Federal Constitution in proscribing indirect state support for religion. The Court rejected that argument:

> On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. On the other hand, the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech. 454 U.S. at 276 (citations omitted).

Widmar held that the university *must* give students access to a public forum for the expression of religious views

and that the university's officials had no discretion under the Establishment Clause to exclude religious expression from the campus. Scarsdale's trustees can fare no better. *Lynch* demonstrates that the Establishment Clause does not require of communities like Scarsdale the charade of a sanitized Christmas observance.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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No. 84-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, *et al.*,
Petitioners,

v.

KATHLEEN S. MCCREARY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted]

BRIEF AMICUS CURIAE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF RESPONDENTS

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v.

KATHLEEN S. MCCREARY, *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights is a civil rights organization, national in membership, organized to combat all forms of religious prejudice and discrimination, and dedicated to the defense of the civil and religious rights of all citizens, especially those rights protected in the First Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

Respondents sought access to Boniface Park to erect a Nativity scene for the Christmas season. Petitioners refused respondents'

proposed display on the basis of the religious content of that display.

Boniface Park constitutes a public forum. Erection of the proposed creche constitutes expressive activity protected under the First Amendment. Consequently petitioners may not, absent a compelling government interest, deny respondents access to the public forum of Boniface Park for free speech purposes on the basis of the religious content of the proposed creche. Petitioners' sole purported justification—desire to avoid violating the Establishment Clause—fails to supply a compelling government interest. An equal access policy for public parks would not violate the Establishment Clause even though that policy provided religious groups a forum for religious expression. *Widmar v. Vincent,* 454 U.S. 263 (1981). Nor would government allowance of a Nativity display violate the Constitution. *Lynch v. Donnelly,* 104 S. Ct. 1355 (1984). Consequently petitioners face no danger whatsoever of violating the Establishment Clause. Since petitioners have not justified their content-based restriction of respondents' free speech, this restriction violates the First Amendment.

This analysis of the case applies regardless of whether respondents post a disclaimer sign accompanying their creche. The Establishment Clause does not require petitioners to disassociate themselves from respondents' creche, since petitioners could themselves erect a creche without violating the Constitution. Therefore the order of the court of appeals requiring a disclaimer sign was improper. If petitioners themselves decide to require a disclaimer sign, they must observe the relevant First Amendment limitations. Thus, a disclaimer requirement—absent a compelling interest—must not discriminate on the basis of content, and may regulate the manner of expression only insofar as it is narrowly tailored to serve a significant government interest.

This Court should affirm the judgment of the court of appeals to the extent that it finds unconstitutional petitioners' content-based denial of repondents' access to a public forum for expressive activity; this Court should, however, vacate that portion of the decision below which requires a disclaimer sign as a condition for recognition of respondents' free speech rights.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS PETITIONER GOVERNMENT'S DENIAL OF RESPONDENTS' ACCESS TO THE BONIFACE CIRCLE PUBLIC PARK ON THE BASIS OF THE RELIGIOUS CONTENT OF RESPONDENTS' PROPOSED CRECHE DISPLAY.

Respondents, in two separate groups, applied to petitioner Village of Scarsdale for permission to erect a creche display at Boniface Circle, a publicly owned park, for the Christmas season. The Village denied both applications because of the religious nature of the displays. These denials represent content-based exclusions of expressive activity from a public forum. Since allowance of this activity would not contravene the Establishment Clause, denial of the creche displays on the basis of their religious content unjustifiably restricts respondents' freedom of speech.

A. The First Amendment Protects Respondents' Free Speech Access to the Boniface Circle Public Park.

Boniface Circle, as a public park, falls within the category of "quintessential public forums," *Perry Education Assocation v. Perry Local Educator's Association,* 460 U.S. 37, 45 (1983); *United States v. Grace,* 461 U.S. 171, 177 (1983). Attempts to restrict expressive activity in such traditional marketplaces of ideas meet stiff constitutional limitations. *Grace,* 461 U.S. at 177. Thus, a government may enforce reasonable time, place, and manner regulations only if these restrictions are neutral with respect to the content of the expressive activity, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Id.* (and cases cited). Restrictions based on the content of the expression, moreover, violate the First Amendment unless necessary to effectuate a compelling state interest and narrowly drawn to serve that interest. *Perry,* 460 U.S. at 45; *Widmar v. Vincent,* 454 U.S. 263, 269-70 (1981).

The placement of a creche in a public park constitutes a form of speech within the ambit of First Amendment protection. *Lynch v. Donnelly,* 104 S. Ct. 1355, 1363 (creche celebrates

Christmas and depicts its historical origins); *Widmar v. Vincent*, 454 U.S. at 269 (forms of religious worship and discussion protected by First Amendment); *Tinker v. Des Moines School District*, 393 U.S. 503, 505 (1969) (symbolic speech protected by First Amendment). Restriction of such activity must therefore meet the strict constitutional standards repeatedly set forth in the decisions of this Court. *E.g., Grace; Perry; Widmar.*

B. Petitioners Have Not Justified the Exclusion of Respondents' Proposed Display.

Petitioners refused permission for the creche display, as the district court found, "because the symbol was religious . . ." *McCreary v. Stone*, 575 F. Supp. 1112, 1125 (S.D.N.Y. 1983). Denial of respondents' application therefore constituted an exclusion of speech on the basis of its content, 575 F. Supp. at 1125. The court of appeals agreed. *McCreary v. Stone*, 739 F.2d 716, 722-23 (2d Cir. 1984). *See Widmar*, 454 U.S. at 269.

To justify the content-based denial of respondents' access to a public forum, petitioners must establish that this denial was necessary to serve some compelling interest, and that the denial represented a response narrowly drawn to serve that interest without unduly interfering with respondents' free speech rights. *Grace*, 461 U.S. at 177. Petitioners, however, have failed to demonstrate a compelling interest which might justify their conduct.

Petitioners claim a compelling interest in avoiding violation of the Establishment Clause. The decisions of this Court in *Widmar* and *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), however, completely dispose of this argument.

In *Widmar* this Court held that an equal access policy in a public university does not violate the Establishment Clause, even if that policy enables religious groups to discuss religion and conduct religious worship in school facilities. 454 U.S. at 270-75. An equal access policy in a public park similarly would pose no Establishment Clause difficulties; on the contrary, the First Amendment effectively compels an equal access policy with respect to free speech in public fora. "The question is not whether the creation of a religious forum would violate the Establishment Clause[;] . . . [instead,] the question is whether [petitioners] can now exclude groups [from a public forum] because of the content

of their speech." *Widmar*, 454 U.S. at 273 (citations omitted). Since equal access for respondents would not run afoul of the Establishment Clause, petitioners have no compelling interest in denying this access; the First Amendment therefore prohibits exclusion of the Nativity display on the basis of its content.

This is not, of course, to say that a government must allow any and all tangible expressive displays regardless of their interference—for example, by overcrowding or obstruction—with the free use of a park. In this case, however, petitioners have raised no objection whatsoever to the proposed creche except that it has religious significance. It is this exclusion on the basis of content, without compelling justification, which the First Amendment forbids.

Even aside from the principles underlying *Widmar*, petitioners cannot justify their exclusion of the creche by a claim that allowing respondents' display would violate the Establishment Clause. In *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), this Court upheld against an Establishment Clause attack a city's sponsorship and maintenance of a Christmas creche. *Lynch* makes it clear that petitioner Village of Scarsdale could itself finance and erect a Nativity scene in Boniface Park. Certainly, then, the Village may simply allow others access to the park to set up such a display at their own expense and effort.

Widmar precludes reliance on the religious nature of the proposed creche display as a basis for denying free speech access for the proponents of that display. *Lynch* recognizes the constitutional acceptability of a governmentally sponsored creche. Either case suffices to invalidate petitioners' proffered justification—fear of violating the Establishment Clause—for exclusion of respondents' proposed creche. Hence petitioners' restriction of respondents' free speech, serving no compelling government interest, violates respondents' rights under the First Amendment.

II. THE CONSTITUTION DOES NOT REQUIRE OFFICIAL DISCLAIMER OF THE PROPOSED CRECHE.

The foregoing analysis suffices entirely to resolve the instant case. Petitioners have improperly denied respondents' rights under the First Amendment. The Constitution does not condition

respondents' rights upon their taking the further step of disassociating themselves and their proposed display from the Village by the use of a disclaimer sign. The court of appeals, nevertheless, apparently imposed a sign requirement in the instant case. 739 F.2d at 727-28. This Court, therefore, should vacate that aspect of the lower court decision.

A. The Establishment Clause Does Not Require Government Disclaimer of a Creche.

In *Lynch v. Donnelly* this Court held that government sponsorship and maintenance of a Christmas creche does not offend the Establishment Clause. 104 S. Ct. 1355 (1984). It follows that a government which does not actually sponsor a creche, but merely accommodates one by means of an equal access policy, faces no constitutional requirement to disassociate itself from the display.

The notion that government must, on pain of unconstitutionality, publicly wash its hands of all religious matters reflects a view of religion as a constitutional "taint," a view explicitly rejected in *Lynch,* 104 S. Ct. at 1365. A government need no more publicly disclaim the free speech activities of religious groups than it need disclaim similar activities by any social, political, or cultural group. *See Widmar v. Vincent,* 454 U.S. at 274.

B. The Discriminatory Disclaimer of Religious Speech Violates the Constitution.

Although the Establishment Clause does not require official disclaimer of a creche, the government may wish on its own initiative to disclaim sponsorship of respondents' proposed creche display. *See* 739 F.2d at 720-21 (Village required sign in instant case); *cf. PruneYard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980) (suggesting disclaimer signs as means for private shopping center to disassociate itself from free speech activities of others on premises). Should the petitioner Village choose to require that such a sign in the future accompany respondents' Nativity scenes, the Village must observe the relevant constitutional limitations.

If the Village of Scarsdale decides to require disclaimer signs for all park displays, regardless of content, this manner regulation would need to be narrowly tailored to serve a significant government interest. *United States v. Grace,* 461 U.S. 171, 177 (1983) (citations omitted).

If the Village decides to require disclaimer signs only for respondents, or only for religious displays, this restriction would, because based on content, violate the First Amendment free speech protections unless narrowly drawn to serve a compelling government interest. *Id.* No compelling interest readily comes to mind which would require a government to disassociate itself from a creche which private citizens have erected in a public park; nor have petitioners demonstrated any such interest. The discriminatory imposition of a disclaimer requirement, moreover, since impliedly treating religion as objectionable, constitutes hostility toward religion. Thus such discrimination violates the constitutional norm of government neutrality toward religion. *Lynch,* 103 S. Ct. at 1359 (and cases cited); *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 788 (1973).

The Second Circuit's creation of a supposed constitutional requirement that respondents post a disclaimer sign, therefore, was both unnecessary and improper. The requirement has no basis in current[1] constitutional law, and forces petitioners to choose between the adoption of a general disclaimer requirement (a matter of administrative, not judicial, prerogative) or the imposition of unconstitutionally discriminatory restrictions on respondents.

CONCLUSION

Petitioners have sought to exclude respondents from equal access to a public park for free speech purposes. Petitioners based this exclusion upon the religious content of respondents' proposed display, yet they failed to demonstrate any compelling justification for this content-based restriction. Therefore, this Court should affirm the judgment of the court of appeals insofar as it prohibits petitioners from excluding respondents' proposed creche on the basis of its religious content. This Court should va-

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[1] A lower court decision issued before *Lynch, Allen v. Morton,* 495 F.2d 65, 67 (D.C. Cir. 1973), required disclaimer signs as a condition for the constitutionality of creche displays. *Lynch,* of course, supersedes this case.

cate that part of the decision below, however, which imposes a disclaimer sign requirement as a condition for respondents' access to the park.

Respectfully submitted,

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No. 84-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. McCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS McCREARY ET AL.

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IN THE

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OCTOBER TERM, 1984

No. 84-277

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE
and THE VILLAGE OF SCARSDALE,
Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS McCREARY ET AL.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, applicable to the States under the Fourteenth Amendment, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . .

The Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents McCreary, et al. (the "Citizens Group") were residents of the Village of Scarsdale at the time of the commencement of this case and are not representatives of any church or religious institution. Four of the members of the Citizens Group, along with 13 other residents, submitted an application to the Board of Trustees of the Village to display a creche in Boniface Circle during the 1982 Christmas season. The applicants stated that the request for the display was for the purpose of availing themselves of their "constitutional right of freedom of religious expression." (J.A. 171).[1]

After the Board's denial of this application, the Citizens Group submitted a similar application in February, 1983 for a creche display during the 1983 Christmas season. This application included the following statement:

> All expenses and costs of the erection and removal of the display will be borne by the applicants, as well as any direct or indirect maintenance costs incurred on the Boniface Circle premises. A notation will be placed on the display indicating that it is made by private citizens and that the Village of Scarsdale does not support or sponsor the display.
>
> Among the several purposes of the undersigned in making this request are desires to join in the Village's celebration of Christmas by giving recognition to the birth

1 "J.A." refers to the Joint Appendix, "Pet. App." to the Appendix to the Petition for Certiorari, and "Stip. Ex." to exhibits included in the stipulated materials in the District Court record. Citations to the Petitioners' Brief are reflected by "Pet. Br."

> of Jesus Christ the occasion and namesake of the holiday, to communicate the Christmas message of peace and goodwill to the Scarsdale community, to celebrate and express religious convictions, and to evoke a spirit of religious toleration and freedom of expression which is fundamental to the well being of our Village and our nation, all of which purposes are grounded in the undersigned's civil and Constitutional rights of free speech and religious expression.

(J.A. 172-173).

There is no published statute, law, ordinance, rule or regulation in effect in Scarsdale requiring persons wishing to use Scarsdale's parks or other public properties to apply for permission from the Board of Trustees; and there are no published standards upon which the Board bases its decisions to grant or deny applicants permission to use Scarsdale's parks or other public properties. (Pet. App. 3a-4a). There are no regulations in Scarsdale pertaining to the use of Boniface Circle and other parks in Scarsdale other than those dealing with leaving the site in a clean and orderly condition, responsibility for damage and possible requirements to obtain public liability insurance, that are relevant to this case.

For 24 successive years, the Village, acting through its Board of Trustees, permitted a display by a committee of representatives of several area churches (the "Creche Committee") of a privately-owned creche in Boniface Circle for a short period of time during each Christmas season. The creche was erected, maintained and taken down by the Creche Committee. No public expense was involved in the display; the Village merely permitted access to the park. During this period, according to the Village Manager, the chief operating officer of the Village since 1961, no one ever complained about the length of time the creche was displayed, and the display never created a single traffic or safety problem. (J.A. 303-304). Further, the record in this case discloses no evidence that the display of a creche in

Boniface Circle interfered with the rights of others to the use of the park.[2]

Boniface Circle is the most appropriate site in the Village for a creche display since it is the principal locus of the Village's Christmas celebration. (Pet. App. 29a). Each year the Scarsdale Chamber of Commerce, of which the Village is a member, after application to and approval by the Village, decorates the area in and around Boniface Circle with festive Christmas lights and ornaments. Village employees put up these displays. In 1982, the large evergreen tree in Boniface Circle was decorated with Christmas lights by Village employees at the request of the Town Club, a private civic organization. The electricity for all these lights is paid for by the Village. Also, in 1982, the annual Town Club-sponsored Christmas carol sing for Villagers took place at Boniface Circle as it had in several earlier years. The repertoire included songs honoring the birth of Christ. As a regular feature of this event, Santa Claus arrived in a Village fire truck and the Deputy Mayor welcomed all Villagers in attendance. (J.A. 50-53; Pet. App. 5a-6a).

The Boniface Circle area continues to be the principal locus for public participation in the Village during the holiday season.[3] No other area in the Village comes close in terms of Christmas decorations and festivities to that of Boniface Circle and its environs. (J.A. 255).

---

2 If the decision of the Circuit Court is allowed to stand, the Citizens Group will defer to and support the Creche Committee's next application to display their creche in Boniface Circle.

3 With no objection by the Board of Trustees or the Village, this year "the most extensive holiday promotion here in many years" took place on the sidewalks and private property within sight of Boniface Circle. Santa Claus roamed the downtown, "handing out candy canes." The "Old Fashioned Holiday" theme continued when "Santa and the Mistletoe Fairy", a children's play with magic and dance was presented. The Manhattan Savings Bank sponsored a musical performance for Chanukah and later a Christmas concert. Once again, The Town Club sponsored a Christmas Carol Sing on December 23, 1984 at Boniface Circle, "inviting the whole community to join in the caroling." *The Scarsdale Inquirer*, November 29, 1984, p. 1, December 13, 1984, p. 1 and December 20, 1984, p. 1.

After some early questioning, the annual creche display in Boniface Circle was largely a non-issue confined to routine Board approvals until a member of the New York Civil Liberties Union (J.A. 199) brought suit in 1976 challenging the constitutionality of the creche on grounds that the display violated the Establishment Clause. *Rubin v. Village of Scarsdale*, 440 F.Supp. 607 (S.D.N.Y. 1977). In this action the Village advised the court that:

> At all times relevant to this action, the Board of Trustees and the officials of the Village of Scarsdale have demonstrated a scrupulous regard for the applicable case and statute law, both Federal and State, and acted in conformity therewith so as neither to promote nor establish a particular religion or abridge the freedom of exercise of any religion.
>
> * * *
>
> Defendant Village and its officials acted in regard to the Creche Committee's request in a manner no different than it would if presented with a similar request from a similar organization.
>
> * * *
>
> . . . the Village has still not committed a proscribed act. It has neither established a religion nor prohibited the free exercise of religion. It has not favored one religious group over another, nor even become excessively entangled in religious matters to a prohibited degree.
>
> * * *
>
> . . . neither the intentions nor motives of defendant, Scarsdale Creche Committee, whether expressed or implied may be imputed to or attributed to the defendant, Village. . . . The Board of Trustees permitted a group of residents to use Village property as it would permit any other similar group seeking such permission.
>
> * * *
>
> In simple terms, this creche in Boniface Circle in Scarsdale was a part of a traditional celebration of the

> Christmas season. Village offices are closed on Christmas Day, an illuminated star is erected on Bellevue Hospital, the U.S. Postal Service issues a stamp depicting a Nativity Scene. Christmas trees are erected and decorated in public buildings everywhere, including the White House. None of these is the establishment of religion so abhorred by the Founding Fathers.

(J.A. 178, 183, 185, 186, 188).

Rubin was dismissed on jurisdictional grounds. In response to the *Rubin* litigation, the Law Committee of the Board of Trustees reviewed an earlier decision by the District of Columbia Circuit in *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973). As a result of this review, the Board prescribed the following text for a sign to be placed by the Creche Committee next to the creche:

> This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization.

(J.A. 125).

In 1975, a Trustee began to vote against the annual creche display, and in 1976 stated that a "symbol of religion should not be on public property". (J.A. 125). In subsequent years, additional Trustees voted against the creche display. In 1981, the Board by a 4-3 vote denied the Creche Committee permission to display the creche in Boniface Circle. As a result of this denial and the subsequent denials in 1982, as the District Court found, a "small uproar" occurred in Scarsdale. (Pet. App. 34a). This consisted mainly of letters and signed petitions addressed to the Board, and in particular to Mayor Jean Stone, who had cast the deciding vote against the creche in 1981, although in earlier years as Trustee she had voted for the creche display.

Until the Answer to the Citizens Group's Complaint on March 30, 1983, the Board or the Village never took the position that they were in any way sponsoring the display of the creche at Boniface Circle. Indeed, in *Rubin*, as seen above,

the Village took the opposite position. In 1980, a report of the Scarsdale Advisory Council of Human Relations to the Mayor and Board of Trustees summarized the differing points of view on the creche in Boniface Circle. This report set forth four reasons for the objections, none of which was an appearance of Village sponsorship. (J.A. 198-203).

When the Board, at an open meeting in December 1982, denied the residents permission to display a creche, it advanced no reasons for the denial. (J.A. 160-170). According to the Chairman of the Board's Law Committee, the Board did so because four Trustees found the display to be "socially undesirable". (Stip. Ex. 66, *The Scarsdale Inquirer*, December 16, 1982, p. 1).

The Citizens Group's action was commenced on February 7, 1983 and sought declaratory and injunctive relief based on the claim that the Board and the Village were depriving the Citizens Group of their First Amendment right to engage in symbolic speech in a public park because of the content of that speech. On April 28, 1983, the Creche Committee commenced a separate action essentially on the same grounds. It was thereafter consolidated with the Citizens Group's action.

SUMMARY OF ARGUMENT

The decision of the Board of Trustees to ban a creche display from Boniface Circle violated the principle of accommodation and content-neutrality required by the First Amendment. The public display of a privately owned creche in a park in the Village of Scarsdale among and along with Village-sanctioned Christmas decorations and festivities is no real threat to the fate of the Establishment Clause. Nothing in this case gives even a remote sign of leading to an established church or religion in the United States or the Village of Scarsdale.

The Free Speech Clause prohibits content-based discrimination against religious speech in a traditional public forum. When government seeks to restrict expression, it bears the burden of justifying its action under appropriate standards

that the Court has articulated. The Board's and the Village's ability to prohibit expressive activity in Boniface Circle is severely limited. In order to justify any content-based exclusion of speech in Boniface Circle, the Board and the Village must demonstrate that the exclusion "is necessary to serve a compelling state interest". *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). The Board's refusal to permit the display of a creche in Boniface Circle constituted a prior restraint on the Citizens Group's right to make their Christmas statement to the community in the most effective and relevant forum in the Village for such purpose. Since there were no pre-existing content-neutral standards to guide the Board, refusal was plainly illegitimate. Despite there being a history of open access to the parks and public properties in the Village, the Board and the Village singled out the Respondents for exclusion. A local government which can arbitrarily grant or deny the right to speak in a traditional public forum in accordance with what it deems to be "socially desirable", or in the "public interest" or "welfare" of the community is indistinguishable in all relevant respects from a censor. If the Board and the Village wish to regulate speech in Boniface Circle then they must show a precise nexus between that speech and some evil which they have a right to prevent.

The display of a creche at Boniface Circle is protected symbolic speech. Both legal principles and factual considerations support the conclusion that the display of a creche in Boniface Circle warrants presumptive First Amendment protection. Under the test formulated by the Court in *Spence v. Washington*, 418 U.S. 405 (1974), the creche is sufficiently expressive for First Amendment purposes. There can hardly be doubt about the communicative status of the creche in context of the Village's celebration of Christmas. Indeed, the Board and the Village admit that it is expressive, that it has a message, for it is because of this message that they banned it from Boniface Circle.

The suppression of the Citizens Group's religious expression is not necessary to further a sufficient government interest.

The Board and the Village have fallen far short of their burden of demonstrating that the Board's decision was essential in order to serve a compelling state interest. Where the forum for expression is a public park the justification offered for exclusion of protected speech must be probed with exacting scrutiny.

Allowing a display of the creche in Boniface Circle for a short time during the Christmas season does not violate the Establishment Clause. Two recent decisions of the Court, *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984), dictate that the Citizens Group's rights of free expression must prevail over the alleged Establishment Clause interest asserted by the Board and the Village. This case involves the display of a privately owned creche in a traditional public forum and thus *a fortiori* satisfies the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) as applied by the Court in both *Widmar* (limited public forum) and *Lynch* (city-owned creche). Since Boniface Circle is a "quintessential" public forum and not a limited public forum as the Court found the University to have created in *Widmar*, access for expression there must be even more strongly protected. The argument that a private symbolic display gives rise to an *appearance* of Village sponsorship is foreclosed by *Lynch* where the city's actual sponsorship was found not to offend the Establishment Clause.

There is no other sufficient government interest at stake to support the exclusion of the Citizens Group's religious expression from Boniface Circle. A neutral policy of accommodation and equal access cannot coerce expression or constitute favoritism. Mere shadows of apprehension and fear cannot animate these concerns. The authorities cited by the Board and the Village reinforce the principle of free speech—they cannot be read to support the principle of "freedom from free speech". The Board's and the Village's objection to viewing a message they do not want to see is not entitled to constitutional solicitude. For the Free Speech Clause to have any meaning, particularly in the area of religious expression, an environment of tolerance, not sensitivity, must prevail. A posture of equal

access to a traditional public forum cannot reasonably be misinterpreted as an appearance of favoritism. The Board's and the Village's attempt to arouse apprehension by presenting an *ad horrendum* argument cannot be allowed to overwhelm the Citizens Group's protected right of religious expression.

ARGUMENT

Introductory Statement

The First Amendment forbids both establishment and hinderance of religion, and requires government to assume a neutral posture towards religion and religious expression. The Citizens Group submits that the kind of government neutrality mandated by the First Amendment is a benevolent neutrality, not a malevolent neutrality. Benevolent neutrality, given effect in an environment of accommodation promotes the fundamental values embodied in the Free Speech Clause and the Religion Clauses. Malevolent neutrality or hostility, even if it could be wielded in an even-handed manner would inevitably undermine these fundamental values. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). There is no constitutional requirement which makes it necessary for government to be hostile to religion. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Accommodation is all that has ever been requested from the Village with respect to a creche display in Boniface Circle during the Christmas season. None of the three main evils against which the Establishment Clause was intended to afford protection, " 'sponsorship, financial support, and active involvement of the sovereign in religious activity' " are present in this case. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (quoting from *Walz v. Tax Commission*, 397 U.S. 664, 668). Jefferson's well known reference to a "wall of separation between church and state" may suggest that governmental accommodations to religion must be condemned. But as Justice Powell noted in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 760 (1973), "this Nation's history has not been one of entirely

sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation". Recent decisions of this Court have confirmed that there was no intention on the part of the Framers to censor or eradicate religion from public life. *See, Marsh v. Chambers*, 463 U.S. 783 (1983); and *Lynch v. Donnelly* 104 S.Ct. 1355 (1984).

The refusal by the Board of Trustees and the Village to permit symbolic religious expression in a traditional public forum is not a realization of Establishment Clause neutrality. To the contrary, after many years of taking a proper neutral stance of accommodation, the refusals by the Board in 1981 and 1982 reflect a conscious institutionalization of hostility against a religious message considered "offensive" or "socially undesirable". This hostility has altered the Board's and the Village's perspective with respect to First Amendment freedoms. Indeed, throughout the Board's and the Village's argument there is a central theme—that there is a First Amendment "right" not to be exposed to the public display of the religious symbols of others—that the right of freedom *of* religious expression is in reality a right of freedom *from* religious expression in the Village square.

The decision of the Board of Trustees violated the principle of accommodation and content-neutrality required by the First Amendment. Ironically, the Board forbade a private display in a traditional public forum of a symbol depicting the historical and religious roots of the Christmas holiday, but permits Scarsdale's official observance of the holiday itself named for and commemorating the birth of Jesus Christ, and Village-sanctioned Christmas displays and activities in that same forum. The only justification which would support the Board's denial of a creche display in Boniface Circle for a short period of time in such context would be a constitutional requirement that passive accommodation by government of religion must be eliminated, at least with respect to Christmas and its identification with the birth of Christ. Simply put, the Board's position is that the people's Christmas displays in Boniface Circle must be "Christ" free.

While selective government advancement of religious activity has never been part of the national tradition and is clearly prohibited by the Establishment Clause, government accommodation of the religious beliefs and customs of the American people and of the religious heritage of our institutions has been part of the fabric of our national life since the adoption of the First Amendment. The Board's decision and argument before this Court runs contrary to this historical and political truth. It is truly an act of censorship against the Christmas holiday itself. The nativity theme is an accepted and traditional part of the American Christmas. To recognize Christmas but prohibit the recognition of one of its components would, as the Court said in another context "give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state." *McGowan v. Maryland*, 366 U.S. 420, 445 (1961).

The public display of a creche in a park in the Village of Scarsdale among and along with Village-sanctioned Christmas decorations and festivities is no real threat to the fate of the Establishment Clause. Neither are the abundant examples throughout the United States for many years of citizens publicly celebrating "Christmas" as an historical and religious event. These practices should be tolerably accommodated since they are the expression of beliefs and cherished traditions of deep moral sentiment widely held by the people of this country, as well as by the people of Scarsdale. Nothing in this case gives even a remote sign of leading to an established church or religion in the United States or the Village of Scarsdale.

For the reasons set forth below, the Citizens Group submits that the Board of Trustees and the Village must permit their temporary display of a creche in Boniface Circle during the Christmas season.

I. THE FREE SPEECH CLAUSE PROHIBITS CONTENT-BASED DISCRIMINATION AGAINST RELIGIOUS SPEECH IN A TRADITIONAL PUBLIC FORUM

At the heart of the free speech guarantee of the First Amendment is the requirement of content-neutrality in terms of government's surveillance. This principle means that when government seeks to restrict expression because of its message or subject matter, government bears the burden of justifying its action under appropriate standards that the Court has articulated. The Board of Trustees and the Village concede that Boniface Circle is a traditional public forum, that the creche display is a form of speech for First Amendment purposes and that the denials were content-based.

A. The Board's and the Village's Ability to Prohibit Expressive Activity in Boniface Circle is Severely Limited

The Court has said that the standards by which content-based restrictions of the right to speak on public property are to be judged depend on the character of the property. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). In *Perry*, the Court stated that forums such as streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," are "quintessential" public forums. In order to justify any content-based exclusion of speech in such a traditional forum, whether of entire subject areas or of particular ideas or viewpoints, government must demonstrate "that its regulation is necessary to serve a compelling state interest" and "is narrowly drawn to achieve that end." *Perry* at 45.

The special status afforded to traditional public forums was reaffirmed in *United States v. Grace*, 461 U.S. 171 (1983). In *Grace*, this Court struck down a statute which prohibited demonstrations on the sidewalks in front of the Supreme Court building, stating " '[P]ublic places' historically associated with

the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more to be 'public forums.' " *Id.* at 177. A government may not impose an absolute ban on expressive conduct in a public forum but may implement only reasonable time, place and manner restrictions. These restrictions in turn must be content-neutral and narrowly drawn to serve a significant government interest. *Id.*

As confirmed by the courts below, Boniface Circle is a "quintessential" public forum where the exercise of First Amendment rights is most important and protected. As such, the Board's and the Village's ability to prohibit expressive activity in Boniface Circle is severely limited. The Board denied the Citizens Group access to Boniface Circle to display a creche for 10 days even though the Village permits the Circle and the surrounding streets to be decorated with Christmas lights and ornaments for over four weeks each year. The Board did so because, according to the then Chairman of the Board's Law Committee, four Trustees found the display to be "socially undesirable". (J.A. 50-53; Stip. Ex. 66, *The Scarsdale Inquirer*, December 16, 1982, p. 1). As admitted by the Board and the Village in their Brief (Pet. Br. 8) the message being conveyed by the display was thought to be offensive or disturbing to some of Scarsdale's residents.[4]

The refusal by the Board to permit the display of a creche during Christmas did not involve an attempted time, place or manner restriction.[5] It constituted a prior restraint on the

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4 Time and time again, on facts not so different from those of this case, the Court has held that public forums are to be made available for religious expression, however unpopular that expression may be. *See Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

5 According to the Village Manager, there has never been any complaint as to the time, place or manner of the annual creche display in Boniface Circle, and the display never created a single traffic or safety problem. In years past, the Creche Committee restored Boniface Circle to its previous condition after each creche display, and no evidence has been produced that the park has ever been damaged in any way by the creche display. (J.A. 303-304; J.A. 36).

Citizens Group's right to make their Christmas statement to the community in the most effective and relevant public forum in the Village for such purpose. Recently, in *Members of the City Council v. Taxpayers for Vincent*, 104 S.Ct. 2118, 2128 (1984), this Court confirmed that there are some interests—such as a desire to suppress support for a minority party or an unpopular cause—that are plainly illegitimate. In *Vincent*, this Court went on to say that the general rule forbidding government regulation of speech in ways that favor some viewpoints or ideas at the expense of others did not apply, since unlike in this case, there was not even a "hint of bias or censorship" in the municipality's enactment or enforcement of an ordinance restraining First Amendment activities. There also was no claim in *Vincent* that the ordinance was designed to suppress certain ideas that the municipality found distasteful or that it had been applied to the speakers because of the views that they expressed. *Id.* at 2128.

The refusal by the Board without being guided by pre-existing content-neutral standards is plainly illegitimate. The Board cannot sit to decide what can or cannot be said in Scarsdale's streets and parks. Boniface Circle is a public park, supported and maintained by all of the Village's residents. As such, it is a public forum, open to all types of expression, including the religious expression of the Citizens Group. Above all else, the First Amendment means that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content". *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone". *Id.* at 96.

The Court of Appeals found that "[i]t is undisputed that throughout the years covered by this litigation, Scarsdale, acting through its Board, usually granted requests for access to and use of its parks and public properties. Rather than issue a complete denial, on each occasion that it did not grant a specific request, the Board usually chose to approve access to the use of alternative public property." (Pet. App. 4a). None-

theless the Board and the Village continue to argue that they have the right to single out the Respondents and deny them access to make their statement in Boniface Circle or in alternative public forums in the Village. At the same time, the Village has regularly permitted symbolic displays in and uses of its public facilities by many groups including religious groups, presumably because no one in the Village has objected to this accommodation or the Board does not find them "offensive" or "socially undesirable". (Pet. App. 4a-5a, 46a; Pet.Br. 3).

Citizens have an absolute right to speak in public forums provided their mode of communication does not interfere with the rights of others and is not basically incompatible with the normal activity of a particular place at a particular time. *See, e.g., Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969); and *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).[6] If this right, as the Board and the Village argue, is only exercisable if they consent to the speaker, the Free Speech Clause has no meaning. A local government which can arbitrarily grant or deny the right to speak in a traditional public forum according to what it deems to be "socially desirable", or in the "public interest" or "welfare" of the community is indistinguishable in all relevant respects from a censor.[7] The Court has consistently held that such prior restraint without adequate standards is precisely the sort of abuse against which the First Amendment was primarily directed. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1974); *Shuttlesworth v. Birmingham*,

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6 The record in this case discloses no evidence that the annual creche display interfered with the rights of others to use Boniface Circle.

7 The Citizens Group's right to display their creche in Boniface Circle is in no way affected by the availability of private sites, presumably their homes. "Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place' ". *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1974) (quoting from *Schneider v. State*, 308 U.S. 147, 163 (1939)).

394 U.S. 147, 153 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); and *Saia v. New York*, 334 U.S. 558, 559 (1948).

If the Board of Trustees and the Village wish to regulate speech in Boniface Circle then they must show a precise nexus between that speech and some significant evil which they have a right to prevent.

B. The Display of a Creche at Christmas in Boniface Circle is Protected Symbolic Speech

Both legal principles and factual considerations support the conclusion that the display of a creche in Boniface Circle is sufficiently expressive to warrant presumptive First Amendment protection.

The creche display is similar to the red flag in *Stromberg v. California*, 283 U.S. 359 (1931), the black arm band in *Tinker v. Des Moines Independent Community School District* 393 U.S. 503 (1969) and the peace symbol on the flag in *Spence v. Washington*, 418 U.S. 405 (1974) in that it is a device designed to communicate views on matters of public importance.

In holding that the symbolic expression was protected speech in *Stromberg*, *Tinker* and *Spence*, the Court applied a two-part analysis. First, the Court determined that the use of the symbol—the red flag, the black arm band and the altered American flag—was a form of expression; or in the words of the *Tinker* Court, "closely akin to 'pure speech'." 393 U.S. at 505. Once the Court had made this determination, the symbolic expression was presumed to be protected speech. It then became the task of the government to offer a compelling justification for the attempted suppression. In each of these cases, the government was unable to overcome this presumption.

In those instances when the Court has upheld bans on expressive activity, it has utilized the same two-part analysis referred to in *Stromberg*, *Tinker* and *Spence*. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court found that the

government's interest in maintaining an efficient Selective Service registration system justified a prohibition on draft card burning, despite the obvious communicative nature of the act. The government's need for a ban on the destruction or mutilation of a draft card provided precisely the fact-based justification which was lacking in *Stromberg*, *Tinker* and *Spence*. And in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the government's demonstrated need to regulate traffic flow on a crowded fairground justified its limitation on peripatetic solicitation.

The teaching of these cases is clear. Once non-verbal activity is deemed to play a significant role in the communication of ideas, it qualifies for presumptive First Amendment protection, which can only be rebutted by a showing that suppression is the only way to achieve a significant and legitimate social goal. If the government fails to make such a showing, it must accommodate and tolerate the non-verbal activity.

Is the creche display sufficiently expressive speech for First Amendment purposes? A test used by the Court to determine whether non-verbal activity is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[ ]," is set forth in *Spence v. Washington*, 418 U.S. 405, 409 (1974). The *Spence* test requires examination of the intent of the would-be communicator and the context in which the non-verbal activity takes place. In *Spence*, the Court held that displaying the American flag with an attached peace symbol in the context of demonstrations against the bombings of Cambodia and the Kent State killings:

> was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

Id. at 410.

The courts below both found that a symbol for First Amendment purposes may be a form of speech (Pet. App. 12a, 40a n.5—noting that the Village conceded this point). In the words of the District Court—"Thus, there is no dispute here that an application to 'speak' from public property was denied". (Pet. App. 40a n.5). The creche is more expressive than most symbols since a religious symbol is as content laden as any religious act. Religion relies on symbols for expression and public manifestation is an inextricable part of religion. There can hardly be doubt about the communicative status of the creche and the message it manifests.

The Citizens Group proposed to place a temporary creche in Boniface Circle to celebrate an historical event, express their religious beliefs, and convey a Christmas message of peace and goodwill. (J.A. 172-173). Its intent was communicative in context of the Village's own celebration of Christmas and the surrounding permitted displays of Christmas symbols and Christmas festivities. The creche itself tells the story of the Nativity as recorded in the New Testament of the Bible. Indeed, the Board and the Village admit that it is expressive, that it has a message, for it is because of this message that they banned it from Boniface Circle.

The only remaining issue is whether the Board and the Village have come forth with a sufficiently compelling justification for suppressing the message of the creche. Starting with the initial defense that Boniface Circle, despite having been deeded to the Village "for Park Purposes Only" (Pet. App. 42a) was not a park, almost two years of litigation have produced a plethora of baffling authorities and considerations allegedly supporting the Board's denials. The latest is a parade of horribles which the Board and the Village say will fall upon communities if creches are allowed to appear at Christmastime. Not even the sum of these purported justifications can veil the stark truth that no sufficiently compelling justification exists for suppressing the display of a creche in Boniface Circle.

II. THE SUPPRESSION OF THE CITIZENS GROUP'S RELIGIOUS EXPRESSION IS NOT NECESSARY TO FURTHER A SUFFICIENT GOVERNMENT INTEREST

The Board and the Village assert that the following concerns animated those who voted against allowing the creche in Boniface Circle: (1) the creche, since a religious symbol, should not be on Village property, particularly when it might give offense to a substantial number of Scarsdale residents; and (2) the Establishment Clause might be violated by allowing the display on Village land due to the inherent religiosity of the creche's message. (Pet. Br. 8). The Court has instructed time and time again, that such a content-based exclusion will only be tolerated if the government can demonstrate that its action was "necessary to serve a compelling state interest" and that it was narrowly tailored to achieve that end.[8] *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 270 (1981); and *Perry Educ. Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 45 (1983). Under this standard, the Board and the Village have fallen far short of their burden of demonstrating that the Board's decision was essential to further a sufficient government interest.

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8 Of course, the Board and the Village could also enforce "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). However, the Board's action is not a time, place or manner restriction. It is a blanket prohibition against display of the creche in Boniface Circle without the benefit of any regulations or discernable standards. Moreover, the Board's decision was not content-neutral. In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court not only stated that content-neutrality was a major criterion for a valid time, place and manner restriction, *Id.* at 648, but expressly warned against the more covert forms of discrimination that may result when arbitrary discretion is vested in public officials. *Id.* at 649. Clearly, the Board's unfettered discretion in denying access to Boniface Circle presents a very real threat to expression protected by the First Amendment.

In defense of their exclusion of the Citizens Group's creche display, the Board and the Village have proffered the following governmental interests: (i) avoiding a violation of the letter or spirit of the Establishment Clause; (ii) avoiding compelled support by the citizens of Scarsdale of religious ideas which the citizens oppose; and (iii) avoiding favoritism among sectarian interests. (Pet. Br. 32). A reasoned inquiry into the facts of this case, however, illuminates a different reality—that none of these interests are here at risk in any significant respect.

In appropriate circumstances rights of free expression must give way to sufficiently important government interests where such interests are genuinely at stake and where no less intrusive measure will protect such interests. *See, e.g., Members of the City Council v. Taxpayers for Vincent*, 104 S.Ct. 2118 (1984) (where political signs were prohibited from utility poles). Indeed, a contrary result would inevitably derail the social engine. Yet, where the forum for the expression is a street, a sidewalk or a public park, the justifications offered for exclusion of protected expression must be probed with exacting scrutiny. This is true not only because such places are our traditional forums for social debate, but because governmental interests are typically less imperative in these forums. *See, e.g., United States v. Grace*, 461 U.S. 171 (1983). Under appropriate scrutiny, the Village's alleged interests do not warrant intrusion on the Citizens Group's First Amendment rights of free speech.

A. Allowing Display of the Creche in Boniface Circle for a Short Time During the Christmas Season Does Not Violate the Establishment Clause.

Two recent decisions of this Court, *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984) impact forcefully on the Establishment Clause defense advanced by the Board and the Village. A meaningful reading of these cases requires the Citizens Group's rights of free expression to prevail over the alleged Establishment Clause violation.

In *Widmar*, the Court had to resolve a tension between the Free Speech Clause and the Establishment Clause. As in this case, religious speech and rights of association protected by the First Amendment were excluded from the forum. 454 U.S. at 269. However, unlike in this case, the University's decision to exclude the student group was guided by a pre-existing University regulation.[9] In addition, the Court expressly recognized that a "university differs in significant respects from public forums such as streets or parks or even municipal theaters." *Id.* at 268 n.5. Nevertheless, the Court instructed that the University had to show that its prohibition of expression was necessary to serve a compelling state interest and that it was narrowly tailored to achieve that end. *Id.* at 270. The University based its denial on the Establishment Clause. The Court determined that although complying with the Establishment Clause may be characterized as a compelling interest, such defense must be scrutinized under the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). *Widmar*, 454 U.S. at 271. The Court held that a policy of equal access would not offend the Establishment Clause. Consequently, the exclusion was determined a violation of First Amendment rights of free speech. *Id.* at 277.

In this case, where the forum is a park and not a limited forum as the Court found the University to have created in

9 Without articulable standards to guide regulation of protected expression, the protections embodied in the Free Speech Clause are particularly vulnerable to encroachment. *Cf. Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). Moreover, the University in *Widmar* sought only to prevent a student group from using its property; it did not seek to completely exclude the group from an important University event. In the present case however, the Board has banned the Respondents from participating in the Village's Christmas celebration. The Village, unlike the University, is actively involved in this celebration, permitting and endorsing symbols and other conduct concerning the Christmas holidays to be displayed and carried on in Boniface Circle and its immediate environs.

Widmar,[10] access for expression must be even more strongly protected. The Board and the Village contend, however, that allowing a private display of a creche, since it is a symbol, poses a different Establishment Clause question than allowing religious expression and worship in classrooms. Specifically, the Board and the Village allege that the private display of a creche gives rise to an *appearance* of Village sponsorship which violates the Establishment Clause. (Pet. Br. 36, 37). However, this argument was foreclosed by this Court's recent decision in *Lynch v. Donnelly* in which Pawtucket's *actual* sponsorship of a creche was found not to offend the Establishment Clause.

In *Lynch*, this Court was faced with a more serious Establishment Clause threat than is here alleged—Pawtucket actually owned and sponsored the creche display. 104 U.S. at 1358. In addition, no counterbalancing free speech right was there at risk. Nevertheless, Pawtucket's display was upheld by this Court.[11]

In its Establishment Clause analysis in *Lynch*, as in *Widmar*, this Court applied the *Lemon* test. The plurality found that Pawtucket's desire "to celebrate the Holiday and to depict the origins of the Holiday" were legitimate secular purposes. *Lynch*, 104 S.Ct. at 1363. Addressing the primary effect of the creche, the plurality observed that Pawtucket's display conferred less of a benefit to religion than numerous other governmental activities which this Court had upheld. *Id.* at 1363. It found that even if display of the creche advanced religion, this was an indirect, remote or incidental benefit to religion, not constitutionally infirm. *Id.* at 1364. Lastly, administrative en-

10 Since Boniface Circle is a public park, the Citizens Group need not even allege a denial of "equal-access". Unlike University classrooms, parks are open to all for protected expression except as such may be regulated to further sufficient government interests.

11 It is difficult to understand how the inevitable and trivial factual differences between the display in Pawtucket and the display in Scarsdale could so transmute the Establishment Clause interests at risk as to overwhelm free speech rights.

tanglement was found lacking since there was "no evidence of contact [between government and] church authorities concerning the content or design of the creche." *Id.* Moreover, because *Lynch* did "not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, . . . no inquiry into potential divisiveness [was] even called for." *Id.* at 1364.

The dissenting Justices in *Lynch* confirmed that the *Lemon* test was the appropriate yardstick to measure government action against the principles of the Establishment Clause. However, in their view the *Lemon* test analysis led to a different result.

The dissent determined that the "City's inclusion of the creche in its Christmas display simply does not reflect a 'clearly secular purpose'." *Id.* at 1372. Rather, a sectarian purpose could be inferred since the alleged secular objectives could have been readily accomplished by other means and since the religiosity of the creche reflected a "sectarian exclusivity" inconsistent with merely celebrating the holiday season and promoting retail commerce. *Id.* Next, the dissent concluded that unlike the University policy of equal access in *Widmar*, Pawtucket by owning and displaying the creche and no other religious symbol, singled out Christianity for special treatment. This resulted in an impermissible primary effect. *Id.* at 1374. Finally, the dissent felt that the "powerful emotional reactions which divided the City along religious lines" represented a warning that the values embodied in the Establishment Clause were at risk. *Id.*

As applied to this case, the *Lemon* test would assuage the concerns expressed by both the majority and the dissent in *Lynch*. Clearly, there is no impermissible sectarian government purpose—permitting the private display would merely be accommodating protected rights of free expression in a traditional public forum. As to effect, allowing the display would no doubt advance religion in a sense. Yet, the effect on religion would be no more than that which accompanies any religious expression in a public forum. This is an incidental benefit to

religion necessary to preserve and promote exercise of the rights protected by the Free Speech Clause—free expression. Clearly, this is not a case where "the power, prestige and financial support of the government is placed behind a particular religious belief." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Finally, with regard to political divisiveness, the Citizens Group notes that the traditional right of equal access to Boniface Circle, a park, should not give rise to divisiveness of a magnitude sufficient to compel intrusion upon First Amendment rights. The "festering" which concerned the dissent in *Lynch* over whether local governments may adopt religious symbols is not here at issue.

Faced with the holding in *Lynch* that government display of a creche during the Christmas season does not violate the Establishment Clause, and faced with the expressed concerns of the dissenting justices in *Lynch*, none of which are significantly at risk in this case, the Board and the Village are forced to argue that *Lynch* is distinguishable and hence, inapplicable. It is respectfully submitted, however, that *Lynch* cannot be distinguished on any legally significant ground.

The Board and the Village argue that *Lynch* is not controlling since Pawtucket's display was on private property while the Village's display was on public property. (Pet. Br. 41). This factual distinction is without significance. This Court in *Lynch* expressly analogized Pawtucket's display to "those to be found in hundreds of towns or cities across the Nation—*often on public grounds*—during the Christmas season." 104 S.Ct. at 1358 (emphasis supplied). Moreover, where public sponsorship and support are direct, as in *Lynch*, such need not be inferred indirectly through the fiction that the "land is the message bearer".[12]

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12 The concept articulated by the District Court, and seized upon by the Petitioners, that the "land becomes the message bearer" of symbolic speech is, to the Citizens Group's knowledge, new to First Amendment jurisprudence.

Contrary to the Board's and the Village's contention (Pet. Br. 42), the context of Pawtucket's display and the display in Boniface Circle are strikingly similar. Both displays are erected only for a short time during the Christmas season. In *Lynch*, the display was located "in a park owned by a nonprofit organization and located in the heart of the shopping district." *Id.* at 1358. In this case, the display was located in Boniface Circle, a small public park in the central business district of the Village. (J.A. 28a). Moreover, both in Pawtucket and in the Village the creche was in the context of a larger holiday display and celebration. In Pawtucket, the park was decorated with "many of the figures and decorations traditionally associated with Christmas. . . " *Id.* at 1358. In Scarsdale, lamp posts in and around the park, and a large evergreen tree in the park are decorated with Christmas lights and ornaments of various kinds and the park is the site of "Christmas Carol Sings" and visits by Santa Claus. In fact, Boniface Circle is the principal locus of the Village's Christmas celebration. (Pet. App. 29a). In short, the displays are substantially similar. To paraphrase the observation of this Court in *Lynch*, "[Scarsdale's] display is essentially like those to be found in hundreds of towns and cities across the Nation—often on public grounds—during the Christmas season." *Id.* at 1358.

In light of these facts, the assertions of the Board and the Village and their *amici* that the creche in Boniface Circle was displayed starkly alone and not within an overall holiday setting is inaccurate and misplaced. (Pet. Br. 42). The distinction advanced here is premised on a myopic view of the proper context—that because no reindeer, Santa Claus house, clown, elephant or teddy bear have been displayed in Boniface Circle, the Boniface Circle display is constitutionally infirm. Clearly, this Court did not intend *Lynch* to be read so narrowly. Such a reading would have absurd consequences. Are the number of lights and ornaments on the evergreen tree and the lamp posts in Boniface Circle to be counted and compared with the number of lights and ornaments in Pawtucket's park? How many reindeer would it take to make display of a creche

constitutionally permissible? Moreover, if the immediate physical context were controlling, local governments could erect creches year round provided they were accompanied by sufficient numbers of secular symbols.

The assertions of the Board and the Village and their *amici* as to context miss the mark. In *Lynch*, this Court acknowledged that the context into which the religious activity is integrated may dilute its otherwise typically singular effect. Yet, this Court was careful to point out that the relevant context was the holiday season: "[the creche must be] viewed in the proper context of the Christmas Holiday season". *Id.* at 1362.

The Board's and the Village's distinction, based on political divisiveness[13] (Pet. Br. 44), merits little discussion. In the words of this Court, "[t]his case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for . . . " *Lynch*, at 1364. In any event, the District Court below concluded:

> The record does indicate the existence of a "divisive political potential" . . . However, a result in the lawsuit, one way or the other, would seemingly leave little to further political debate, and accordingly we do not see the divisiveness element as contributing much to entanglement.

The administrative entanglement argument is equally unpersuasive—and the District Court so found. (Pet. App. 52a-53a). In this case as in *Lynch*:

> There is no evidence of contact with church authorities concerning the content or design of the exhibit . . . No expenditures for maintenance of the creche have been

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13 In light of the peaceful history of the creche display in Scarsdale, the Citizens Group finds it incredible that the Board and the Village analogize the purported "divisiveness" in the Village to the "fear that neighbors would be pitted against each other by jockeying for religious leverage in government just as bloody wars had been fought so often over religion." (Pet. Br. 44–45).

> necessary . . . In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries.

Lynch, at 1364. Because in this case the Citizens Group's creche is privately owned and because the Citizens Group is not affiliated with any church there is no interaction at all between church and state concerning the creche.

Apart from attempting to distinguish *Lynch*, the Board and the Village devote much of their argument to predicting the perceived effect of the creche display in Boniface Circle. (Pet. Br. 17-19). In attempting to fortify their contention that the creche will be mistakenly perceived as Village-sponsored, the Board and the Village claim that the Citizens Group's intent was to co-opt the Village as co-sponsor of their speech—to seek the aura of Village approval—and to seek an imprimatur of the Village. This claim is unsound. First, as a matter of law, the intent or purpose of the Citizens Group is irrelevant—the *Lemon* test dictates that it is government's purpose which is relevant to an Establishment Clause analysis. Second, as a factual matter, such claim is baseless. There is nothing in the record to support such a claim. In no place in the two applications made to the Board by the Citizens Group (J.A. 171-173), the oral statement made to the Board by Respondent McCreary on December 14, 1982 (J.A. 160-168), the Citizens Group Complaint (J.A. 3-10), or the depositions of Respondents McCreary and Butler, which are part of the trial record on appeal, is such an intention stated.[14]

Furthermore, to dispel any misperception of Village sponsorship, an explanatory plaque was placed next to the creche by the Creche Committee and the Citizens Group proposed to do the same. The dissenting justices in *Lynch* expressly acknowledged the effectiveness of such disclaimers—even in the

14 In addition to the statements in their 1982 and 1983 applications, the McCreary deposition testimony clearly contradicts these allegations. (See J.A. 250-251; 252-255; 257-259).

context of direct government sponsorship of the display.[15] In any event, assuming *arguendo* that display of the creche in Boniface Circle would have a perceived effect of the Village supporting religion, in light of *Lynch* this argument cannot prevail in the context of a creche display during the Christmas season. In *Lynch*, where government support was actual—not merely perceived—the effect of such support was characterized as an "indirect, remote or incidental benefit" not constitutionally infirm. *Id.* at 1364.

The most telling distinction between *Lynch* and this case provides additional support for the constitutionality of the creche display in Boniface Circle. In this case, but not in *Lynch*, First Amendment rights of free speech are involved. In the context of private citizens exercising First Amendment rights of free speech, the constitutional balance is tipped. Government conduct which, in the abstract, may tread close to Establishment Clause proscriptions, may be nothing more than constitutionally-mandated accommodation of the exercise of protected rights. The dissent in *Lynch* recognized this. Referring to this very case and distinguishing Pawtucket's creche the dissent stated:

> Inclusion of the creche is not necessary to accommodate individual religious expression. *This is plainly not a case in which individual residents of Pawtucket have claimed the right to place a creche as part of a wholly private display on public land.* Cf. . . . *McCreary v. Stone*, *Lynch*, *supra* at 1382. ____F.Supp.____ (1983) (emphasis supplied).

15 The dissent stated:

> Moreover, the City has done nothing to disclaim governmental approval of the religious significance of the creche . . . when the Court of Appeals for the District of Columbia approved the inclusion of a creche as a part of a national "Pageant of Peace" on federal parkland adjacent to the White House, it did so on the express condition that the government would erect "explanatory plaques" disclaiming any sponsorship of religious beliefs associated with the creche. . . . In this case, by contrast, Pawtucket has made no effort whatsoever to provide a similar cautionary message.
> *Lynch*, 104 S.Ct. at 1376.

In sum, the plurality of this Court concluded in *Lynch* that any notion that Christmas symbols such as the creche "pose a real danger of establishment of a state church is far-fetched indeed". *Id.* at 1366. Moreover, the expressed concerns of the the four dissenting Justices in *Lynch* are not jeopardized by policies of equal access and accommodation in public forums. The "precious religious diversity" of our nation is not here threatened by government's adoption of a religious symbol—rather, it is threatened by the Board's denial of a request for equal access to a traditional public forum.

B. There is No Other Sufficient Government Interest at Stake to Support the Exclusion of the Citizens Group's Religious Expression From Boniface Circle

The Board and the Village allege that avoiding coerced expression of the citizens of Scarsdale and avoiding favoritism also support the Board's denial of a creche display in Boniface Circle. Yet, a neutral policy of accommodation and equal access cannot coerce expression or constitute favoritism. Mere shadows of apprehension and fear cannot animate these concerns.

The Board and the Village reason that the creche is opposed by some Villagers and hence, "[i]f a court or other public official overrides these and allied objections, compelling placement of the creche in the park, these opponents are dragooned into supporting the symbol and its public statement." (Pet. Br. 32). To support their argument, the Board and the Village rely on *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Barnette*, the Court acknowledged that a compulsory flag salute, which would subject any non-participating child to serious sanctions, violated an individual's right to speak his own mind. 319 U.S. at 634. The Court affirmed the lower court's ruling enjoining enforcement of the regulation requiring the flag statute against Jehovah's Witness-appellees. *Id.* at 642. Similarly, in *Wooley*, the Court determined that New Hampshire's statute which required display of state license

plates bearing the motto "Live Free or Die", violated appellees' rights to refrain from speaking. 430 U.S. at 717. The Court upheld the lower court's decision which enjoined the state from arresting and prosecuting the appellees for covering the portion of their license plates which contained the motto. *Id.*

In each of *Barnette* and *Wooley*, persons were compelled by force of law to dictated expression. In both cases, the Court determined that the individual's right of free speech, including the right to refuse to speak the thoughts dictated by others, outweighed the alleged government interests in compelling the expression. Moreover, in *Barnette* the Court noted that the appellee's non-compliance with the compelled expression would not interfere with the free speech rights of others. 319 U.S. at 630. Finally, in both *Barnette* and *Wooley*, the remedy was to enjoin enforcement of the law against the appellees—not to prohibit others from participating in such expression.

The Board and the Village attempt to transmute *Barnette* and *Wooley* from a shield protecting free speech, by preventing governmental compulsion of dictated expression, to a sword to be used against free speech, by prohibiting protected expression with which the viewer may not agree. *Barnette* and *Wooley* reinforce the principle of free speech—they cannot be read to support the Board's and the Village's principle of "freedom from free speech".

Since Boniface Circle is held in trust by the Village for the people, the Board and the Village argue that by allowing the display of the creche, Villagers would be compelled to bear a message with which they do not agree. (Pet. Br. 32-35). However, it is curious logic indeed which imputes to the listener or the viewer the message of the speaker. This would necessarily result in a prohibition of all expression in public parks with which any listener or viewer did not agree. In essence, the Board's and the Village's objection is to a message that they do not want or want others to see.

This interest is not entitled to constitutional solicitude. With the benefits of free speech come the burdens of hearing or viewing differing messages. For the Free Speech Clause to have meaning, particularly in the area of religious expression, an environment of tolerance, not sensitivity, must prevail. The Board and the Village and all others are and must remain free to voice their countering or confirming views—they cannot, however, be given veto power over the religious messages of others. The Court summarized this principle in *Tinker v. Des Moines School District*, 393 U.S. 503, 508 (1968):

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Clearly, the Court's admonition applies *a fortiori* to public parks. *See also*, *Spence v. Washington*, 418 U.S. 405, 412 (1973)—"It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

As a final justification for excluding a creche display from Boniface Circle, the Board and the Village assert that the Trustee's action was "sound fulfillment of their duty not to play favorites." (Pet. Br. 35). Inasmuch as complying with its duty of holding open the doors of a public park to protected

expression could not sensibly be determined to be playing favorites, the Board and the Village once again resort to the "appearance" argument—the Village must avoid even the appearance of playing favorites. However, in a public park, unlike might be the case in city buses (*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)), or utility poles (*Vincent, supra*), or on the side of a mountain in a state forest (*ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983)) the appearance of playing favorites alone is not sufficient. Moreover, due to the characteristically "public" nature of the Village square, the nexus between government and the expressed message is particularly tenuous. As a result, the apprehension of appearance of selective government endorsement in a "quintessential" public forum as opposed to other public property, such as the side of a mountain, is diluted. A posture of equal access to a traditional public forum cannot reasonably be misinterpreted as appearance of favoritism—the Village would be favoring none but merely accommodating all.

Although not expressly asserted as a counterbalancing interest, the Board and the Village present an *ad horrendum* argument that American flags bearing swastikas and hammers and sickles (Pet. Br. 24), vulgar signs (Pet. Br. 30), burning Klan crosses (Pet. Br. 31), and signs saying "God does not hear the prayers of Jews" (Pet. Br. 34) would inevitably result from allowing a creche display at Boniface Circle. This conclusion is unsound both as a matter of fact and law.

First, as a factual matter it must be noted that creche displays on public property at Christmas have pervaded this country in cities and towns, such as Scarsdale, over the years. Nevertheless, displays of burning Klan crosses and swastikas on public property are rare indeed, and have never occurred in Scarsdale. Furthermore, no nexus between the creche displays and those of burning crosses and swastikas has thus far been suggested. It belies common sense to suggest that a decision of this Court allowing a private creche display in Boniface Circle would encourage public displays of burning Klan crosses and swastikas.

Second, as a matter of law, rights of expression may be regulated to further sufficient government interests both in the form of reasonable time, place and manner restrictions, *Cox v. Louisiana*, 379 U.S. 559 (1965), and in compelling circumstances of clear and present danger or "fighting words", as an outright prohibition. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Certainly, burning Klan crosses and other symbolic speech attacking or villifying a creed or race, if protected speech at all, gives rise to counterveiling government interests of a magnitude sufficient to warrant regulation—celebratory displays typically would not.

In any event, burning crosses and swastikas are not at issue in the case before this Court. Unlike the Board and the Village, the Citizens Group is not asking this Court to rule on those issues. The Board's and Village's attempt to arouse apprehension cannot be permitted to overwhelm the Citizens Group's protected right of religious expression. The naked assertion of undifferentiated fear cannot justify suppression. *Tinker*, 393 U.S. at 508.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

December 28, 1984

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No. 84-277 (9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—v.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DESOUSA

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1984

No. 84-277

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—v.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DESOUSA

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

The respondents steadfastly ignore or obfuscate the fact that Scarsdale *has never had a "forum generally open" for unattended partisan or sectarian symbols*. Building upon the resulting void, they press for an unprecedented and unprincipled right to leave a crèche in the public park over the judgment and decision of the Village's elected Board. They argue that the

Circuit should be affirmed without worrying about general principles. They say that cognate problems of demanded public park space for swastikas or other "fighting" symbols—to say nothing of "adult" statues or vulgar or partisan political signs—can be pretermitted because only a crèche is involved in this case. But it is clear that the new and interesting problems in this case cannot be resolved merely by mechanical shuffling of old categories without regard to principle.

Unlike respondents, the United States as *amicus curiae* contributes a genuine effort to grapple with the challenging problems this case presents. The Solicitor General appears to acknowledge that a free speech rule requiring a Nativity scene in the park would require widely detested or disfavored symbols as well. He recognizes too that incantation of the term "public forum" is not an adequate solution and that Scarsdale could on "neutral principles" deny a public site both for religious symbols and for vulgar or offensive or merely partisan political, ideological or sexual signs (Br. 21 *et seq.*). Beyond that point, however, the Government's position becomes (a) somewhat ambiguous in spots, suggesting a "principle" that is either obscure or identical with petitioners' position (*infra*, pp. 13-14), and, ultimately, (b) overly broad and intolerable, requiring a choice between allowing all private structures or none to stand in public parks (*infra*, pp. 14-15).[1]

Petitioners submit that none of the variable and inconsistent positions on the other side provides a sound basis for affirmance. Scarsdale's ending of the annual display of the only partisan or sectarian symbol ever emplaced in its parks left the Village with a principled, neutral, constitutional stance. The

1 Another *amicus*, the Catholic League for Religious and Civil Rights, tenders another new thought—that the decision of the Court of Appeals should be vacated insofar as it "imposes a disclaimer sign requirement" (Br. 7-8). The contention may follow from the logic of respondents' position—*i.e.*, that there is no danger of an appearance of government support for an unattended symbol standing in the public park. The respondents, however, filed no cross-petition for certiorari and make no such argument. To the contrary, both they and the Solicitor General rely upon the disclaimer sign as an adjunct favoring their several positions (McCreary Br. 28-29; Creche Comm. Br. 21, 26; U.S. Br. 14).

judgment of the Court of Appeals is justified neither by the Free Speech Clause nor on any other valid basis.

1. Scarsdale has sensibly allowed in its parks only a few nonpartisan community symbols like those of the Red Cross and the United Fund

Over and over again the respondents cite as a complete and free-standing "finding" that Scarsdale has made its parks "freely available" for the placement of unattended symbols of all kinds (Creche Comm. Br. 4, 6, 7, 12, 16, 17, 18, 21, 25; McCreary Br. 8). The Solicitor General, treating the facts with contrasting (and expected) fairness, helps to expose the misleading nature of those statements (Br. 4 & n.2, 24). At any rate, the undisputed facts of record, and the District Court's opinion, make clear that respondents' assertions are out-of-context distortions.

What the District Court found, and the record shows, is that Scarsdale's land has been used only for such totally noncontroversial symbols as those of the Red Cross, the Cancer Crusade, the Girl Scouts, the Boy Scouts and the United Fund, and never for controversial partisan or sectarian symbols other than the crèche (Pet. App. 43a-47a, 58a-59a; J.A. 58-63). Indeed, the Creche Committee, purporting to provide some *examples* of unattended symbols permitted in Scarsdale's parks, has listed the *only* seven such displays ever to have received Board approval (Br. 4). The sole controversy through the years has been over the crèche (Pet. App. 56a). Scarsdale's Board, assuming it ever had the right to make that exception, plainly had the right to eliminate it. The grounds for that conclusion, argued in our main brief, are buttressed in this reply.

2. A forum "generally open" for live speech of all kinds need not be open for the planting of partisan or sectarian symbols

The first question presented in this case is whether a forum generally open for live forms of expression, but never for partisan or sectarian symbols other than the crèche, *must be* a

forum generally open for unattended symbols.[2] Unlike the National Park Service, neither Scarsdale nor any municipality

2 The Solicitor General argues that the Court of Appeals' decision "did not compel the Village to grant permission for respondents to put on their display" (Br. 7). Explaining this, and quoting from the opinion below, the Government says the Circuit only enjoined reliance upon the Establishment Clause "as a reason for prohibiting the erection of a creche at Boniface Circle" (*id.*, quoting Pet. App. 25a). Since he says nothing is compelled except relinquishment of a reason, and though he would deem it wrong to compel room for unattended structures as "a *constitutional* rule" (*id.* at 3, emphasis in original), the Solicitor General finds this a "basis" on which he is able to "urge affirmance of the judgment below" (Br. 20).

This is an ingenious but ultimately useless analysis. The courts do not sit—nor did the Circuit sit—to give advisory opinions about "reasons." "This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). The Solicitor General's formulation, were it valid, could apply to denature this Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). There, as here, the plaintiffs, invoking the Free Speech Clause, sought to use for religious expression a University public forum, and the defendants resisted on the basis of the Establishment Clause. The Eighth Circuit ruled that the University "may not" prohibit such a use. *Chess* v. *Widmar*, 635 F.2d 1310, 1312 (1980). This Court affirmed, sustaining the positive ground of plaintiffs' claim, the Free Speech Clause, and rejecting the Establishment Clause defense. In those vital respects, this case is identical in the judgment of the Court of Appeals.

The Court of Appeals made the identity plain in its square reliance upon *Widmar*. If the Solicitor General were correct in saying (Br. 19) that the entirety of the "holding" below was covered when the Court wrote (Pet. App. 24a) that it held "only that the Village would not contravene the establishment clause by allowing the display of a creche at Boniface Circle," there would have been no occasion for that Court even to mention *Widmar*. Nor would it have had to order the District Court to deal with the disclaimer sign (Pet. App. 21a-22a). Nor would it have remanded both "for action regarding a disclaimer sign . . . *and* for other such *action* as is consistent with [its] determination" (Pet. App. 25a, emphasis added). The Court of Appeals tracked *Widmar* in detail to its parallel result, ordering an injunction down to the detail of the sign, equating the student speakers with the unattended Nativity scene. Everybody thought, and thinks, the University in *Widmar* was *compelled* to allow the plaintiffs to use the public forum as they demanded. Here, similarly, both the petitioners and the respondents (*see* Creche Comm. Br. 29-30; McCreary Br. 21) proceed on the understanding that the Court of Appeals followed the lines of *Widmar* to a similar form of injunction. It is not uninteresting, moreover, to note the Solicitor General's similar view of *Widmar* in an *amicus* brief filed almost simultaneously with his brief herein. Supporting as *amicus* the petition for certiorari in *Bender* v. *Williamsport Area School District*, No. 84-773—a course he was invited but declined to take at the petition stage of the instant case—he described *Widmar* (Br. 9) as having held that the University of Missouri, having "created a limited public forum . . . *could not* close its facilities to a group wishing to engage in religious worship and discussion" (emphasis added).

In any event, meeting the first, affirmative, essential *Widmar* premise, petitioners seek to show that respondents do not have the Free Speech claim for placing their symbol in the park that plaintiffs had for their live speech in *Widmar*. If we are correct in that, there should be a reversal without reaching the Establishment Clause question. If we are wrong in that first point, but correct in our Establishment Clause claim, distinguishing *Lynch* v. *Donnelly*, that is an alternative ground for reversal. Either way, this Court's granting of the writ was appropriate and the injunction ordered by the court below is a compulsion, not the mere disagreement about a "reason" to which it is diminished in the Government's presentation.

we know of has created a forum generally open for unattended symbols and, as the Solicitor General agrees, they are not required to. Most or all municipalities answer the question presented as Scarsdale did, by creating of their parkland limited forums for signs or structures—allowing only a few unattended symbols that are generally favored by the community, nonpartisan and nonsectarian. Whatever may be true of other forms of expression, it has never been a proposition of American law or practice that the "uninhibited, robust, and wide-open" debate safeguarded by the First Amendment, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), must be extended to include powerfully sectarian and divisive symbols compulsorily installed in the public parks.

Public agencies have broad authority, where unattended signs or symbols are concerned, to decide (a) whether to create a public forum and (b) whether the forum is to be limited or unlimited. If it once creates a forum open for all speakers, the government cannot, without a compelling reason, exclude some speakers on the basis of their subjects or views. *Widmar* v. *Vincent*, 454 U.S. 263, 269-70 (1981); *Carey* v. *Brown*, 447 U.S. 455, 464-65 (1980). If it creates a forum generally open for all kinds of signs and symbols, the government may not exclude some on discriminatory, content-based grounds. *E.g.*, *Lebron* v. *Washington Metropolitan Area Transit Authority*, No. 84-5189 (D.C. Cir. Dec. 14, 1984); *Planned Parenthood*

Assn. v. *Chicago Transit Auth.*, 592 F. Supp. 544 (N.D. Ill. 1984); *Coalition for Abortion Rights* v. *Niagara Frontier Transp.*, 584 F. Supp. 985 (W.D.N.Y. 1984). But the government is empowered to make places available for some kinds of expression or communication while it enforces reasonable exclusions based upon the nature of the speech and the places and on sound judgments of fairness. *Greer* v. *Spock*, 424 U.S. 828, 838 & n.10, 839 (1976); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302-03 (1974); *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972).

The fact that some kinds of speakers are allowed does not "serve to convert [government property] into a public forum." *Greer* v. *Spock*, 424 U.S. at 838 n.10. Distinctions based on "content" (which is not a simple talisman) may create forums only partially open. The government may supply communicative facilities even for some *speakers* without opening them generally as a forum. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 47-48 (1983). A government enclave may be opened still more widely for varieties of speakers, but excluding some whose subjects are at war with the enclave's functions. *Greer* v. *Spock*, 424 U.S. at 838 n.10, 839. By a parity of reasoning, the allowance of some symbols, cherished (or at least not opposed) by all in the community, does not require that the public land be made available for any kind of disputed symbol anyone wishes to leave there. An array of precedent and sound principle supports this conclusion.

Our adversaries distinguish cases like *Lehman*, *Greer*, *Perry* and still others on the grounds that they did not involve unlimited public forums. That is part, however, of a consistent course of question-begging. The underlying question is whether Scarsdale has ever had, or must have, a public forum for unattended structures. If that question calls for a negative answer, as we urge, the principles of the cited cases come strongly to bear. And it is worth stressing that *there is no decision other than that of the court below supporting respondents' claimed right to plant and leave their symbol in the park as an exercise of the right of free speech.*

As the respondents point out, the "government" itself puts symbols on its property reflecting community sentiments and values, but nobody has ever imagined this creates "forums generally open" for competing or opposed symbols. To take one of respondents' examples (Creche Comm. Br. 13), Richmond's prominent statues of Confederate Civil War heroes have not been thought to open that City's streets for compulsory display of statues of John Brown or Nat Turner, or even Abraham Lincoln. Contrariwise, it is not the law that the Federal Government must make room at the Lincoln Memorial area for a statue of Jefferson Davis or on the Mall for an anti-Vietnam War memorial to compete with one recently placed there. Though Spence could fly his revised American flag on private property, *Spence* v. *Washington*, 418 U.S. 405 (1974), the Government, without writing a "neutral rule" for this in advance, need not let him plant it at the Washington Monument alongside the American flags that fly there. "The majority, as represented by its elected officials, has a right to speak."[3] If the "speech" takes the form of valued symbols on public places, those places do not thereby become "public forums" for other symbols that the majority chooses not to display or have displayed.

The reminder of unattended symbols for which governments characteristically employ their own land highlights in its own way the material differences between such uses of public land and the transient presence of live speakers. These differences, which are at the heart of the case, include centrally the inescapable association, physical and perceptual, between the land and the structure left upon it. This central factor is resolutely ignored by respondents or, worse yet, treated as if it could be talked away. Like the District Court (Pet. App. 56a), the Solicitor General confronts (Br. 23) the special character of the "unattended structure" that "sits there, unmoving," and is "more likely [than a speaker] to be viewed as communicating the government's own views." Blinking the realities, which so clearly and explicitly concerned Scarsdale's Trustees and resi-

3 M. YUDOF, WHEN GOVERNMENT SPEAKS 46 (1983).

dents, much of respondents' general argumentation about "protected speech" is beside the point.[4]

In the civilized service of community sensibilities, even private land may be regulated to exclude some forms of "speech" from some areas. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 512 (1981); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). In this significant sense, the majority's aesthetic and moral sentiments are accommodated without censoring or suppressing the speech thus regulated. Free expression on one's private property is surely even more protected than speech or expression in the parks. *Cf. Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Spence* v. *Washington*, 418 U.S. 405 (1974). The differences, whatever they signify for live speakers, make no room for judicial orders requiring a place in the park for contentious symbols the community resists without favoritism to anyone or any viewpoint.

3. Scarsdale's position imports no hostility toward religion

A constant theme of respondents' briefs is that Scarsdale's denial of a public site for the crèche was prompted by hostility or aversion to religion, and particularly to the Christian reli-

4 The District Court, observing that the unattended symbol delivers its Christian message even if respondents are far away from it and never go near it, found that for such a symbol thus sited the public land in some measure becomes "the message bearer" (Pet. App. 55a-56a). It added (Pet. App. 57a): "Indeed, cultivating an aura of Village approval is, in our view, one of the factors fueling plaintiffs' desire to have the creche on public property." The Creche Committee answers that its "intention . . . is constitutionally irrelevant" (Br. 19). The Solicitor General makes similar observations about the irrelevancy of "motives and reasons" (Br. 15 n.9). These are not weighty thoughts. The District Court's findings reflect the teachings of elementary law and common sense. It is obviously relevant, constitutionally and otherwise, especially where *appearance* is of prime importance, that a person intends effects that are said to have been achieved. *E.g.*, *Perfect Fit Industries, Inc.* v. *Acme Quilting Co.*, 618 F.2d 950, 954 (2d Cir. 1980), *cert. denied*, 459 U.S. 832 (1982); RESTATEMENT OF TORTS § 729 comment f (1938). As for the Creche Committee's hypothetical concerning the Vatican (Br. 19), which must be supposed to have been advanced seriously, it would indeed be a constitutional concern if the Vatican, unimaginably, were to offer objects to place on American public property with the purpose of using that property for proselytization in the teeth of the First Amendment.

gion. They din words like "suppression" and "censorship" of religion to characterize a Village where religious manifestations of all kinds appear everywhere and where crèches are freely displayed, but have been denied the authority of a public platform (McCreary Br. 8, 12, 19, 20, 34; Creche Comm. Br. 14, 16, 17, 18, 19, 29). It is said that the Village wants a "sanitized" or " 'Christ' free" Christmas (Creche Comm. Br. 31; McCreary Br. 11) and accomplishes "a conscious institutionalization of hostility against a religious message" (*id.*). Vividly contradicted elsewhere by respondents themselves, this is a baseless and unworthy line of argument.

The record reflects no antireligious sentiments harbored by the Trustees who voted against display of the crèche. Rather, like the four dissenting Justices in *Lynch*, the Trustees consistently showed respect, and even devotion, to the crèche and the religious message it conveys. Far from discriminating against respondents' message, former Mayor Stone, who cast the deciding votes against the crèche in 1981 and 1982, is, as the District Court mentioned, "a Christian . . . who maintains a creche in her own home" (Pet. App. 60a). Time and again throughout the annual debates Mayor Stone and Trustees on both sides of the issue recognized that opponents were not "against the display of the creche" throughout the Village, but only against "allowing a religious display on public property" (J.A. 142, 144, 149, 163, 208). The Trustees in 1981 expressed their "delight" that the crèche would be displayed on private land across from Boniface Circle (J.A. 149) and in 1982 permitted a private group to "celebrate the birth and divinity of Jesus Christ" on Boniface Circle through carols amplified by Village-owned loud speakers (Creche Comm. Br. 27-28; J.A. 52-53).

In the face of what this record actually shows about Scarsdale's hospitable treatment of all religions, certainly not excluding Christianity, respondents ascend to claims for "tolerance" (McCreary Br. 9, 32; Creche Comm. Br. 13-14), even comparing Scarsdale unfavorably with the "black citizens" and others who are said (Creche Comm. Br. 13) to accept "without notable discord" Confederate statuary in Richmond

and other cities of the South.[5] The black citizens who could not even vote when such statues were erected would find words other than "tolerance" to describe their feelings about Confederate memorials. *Cf. Augustus* v. *School Board*, 507 F.2d 152, 155, 156 (5th Cir. 1975), affirming limitations on the First Amendment right to employ symbols in a school integration context of "racial tension" resulting from "black students' demands to abolish the school's Confederate symbols." *See also* Professor Black's thoughts of a native son on the differences in the South between symbolic names like "Leeville" and "Carver" or "Lincoln High." *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960).[6] This is

5 Seemingly without noticing the self-contradiction, respondent Creche Committee notes repeatedly (Br. 5, 19, 27-28) the extensive record evidence of the regular and wholly welcomed appearance in Scarsdale's parks of live carolers and other celebrants proclaiming "the birth and divinity of Jesus Christ." Churches of all denominations use publicly owned facilities for services and meetings (Pet. App. 4a-5a, 56a; J.A. 55-58).

6 In one respect, respondents' discussion of such government sponsored (but not universally applauded) symbols as Confederate statuary prompts us to restate and clarify some of the broader implications in our main brief. The example of Richmond is indeed a reminder that any symbol or statue emplaced or allowed by municipal authorities—whether Confederate generals or Vietnam veterans or perhaps even the Red Cross and the United Fund—is liable to evoke negative and hostile reactions in some residents. It is not to be supposed that this entails a veto power for every resident. But if the opposition rises to a sufficient level, the protests may stir difficult questions as to whether the government has exceeded its constitutional authority, violating First Amendment rights of the protesters. *Cf. Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Augustus* v. *School Board*, *supra*; M. YUDOF, *supra* note 3. It may come to be held, as the citations suggest, that the public agency *may not* allow or itself erect particular controversial symbols employing shared resources. But this is 180 degrees away from the claim that the Free Speech clause *compels* a public site for such symbols because they are "speech" (admittedly) and live speakers would be entitled to deliver their messages on that site. What respondents help to clarify is that this case, dealing with the unprecedented and extraordinary rights claimed by respondents, will not answer all the questions over the horizon about permissible or required symbols in the public parks. The decision can and should, however, repel the basic thesis that the courts under the Free Speech Clause are required or permitted to supersede the judgments of elected municipal officials and order a place in the park for anybody's statue or symbol, generally loved or hated, because it is "speech."

not the most important respect, however, in which respondents' use of the word "tolerance" is fanciful.[7]

4. Scarsdale's neutral principle of access, reached through careful scrutiny of the only case presented, should be sustained

With the elimination of respondents' unfounded premise that the Village parks are, or must be, unlimited public forums for partisan structures or symbols, the constitutional power of the Board to refuse a public site for the crèche seems plain. Scarsdale's position is supported by clear lines of this Court's authority, steadily invoked by petitioners and steadfastly ignored by respondents. Neither respondents nor anyone else has any "generalized constitutional right," *Greer* v. *Spock*, 424 U.S. at 838, to "speak" through signs or other objects placed and left on public property. More particularly, the grounds supporting Scarsdale's decision are:

(1) The decision "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. at 46; *Greer* v. *Spock*, *supra*; *Widmar* v. *Vincent*, 454 U.S. at 280, 281 (Stevens, J., concurring).

(2) The unprecedented claim of a right to override the judgments of municipal officials and leave unattended structures or symbols in the parks is wholly incompatible with the lawful, traditional, intended and

7 In addition to their Pickwickian conception of "tolerance," the McCreary respondents express incredulity that anyone could talk of "divisiveness" given the "peaceful history of the creche display in Scarsdale" (Br. 27 n.13). It bears mention in this light that through all the years when the crèche was allowed on Boniface Circle, the objections were indeed peaceful and civil, though steady and substantial. When permission for the crèche was denied, however, the ensuing "small uproar" included a significant number of objectors who "perceived the problem as one stemming from a difference between Christians and Jews" (Pet. App. 34a) and "a handful [that] . . . could be called blatantly antisemitic" (Pet. App. 35a). The then Mayor placed the number of letters with "an antisemitic tone" at "at least 100" (Pet. App. 34a).

dedicated uses of these communally owned places. *Perry, supra*, at 46, 49; *Greer, supra*.

(3) Neutral limitations upon place or medium, and even upon classes of speakers, may relate to the content of the expression provided they serve significant interests. *CSC* v. *Letter Carriers*, 413 U.S. 548, 564 (1973); *Young* v. *American Mini Theatres, Inc.*, *supra*; *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). As shown in our main brief (p. 31 *et seq.*), this standard is met here; in the service of competing interests that are themselves of First Amendment moment, Scarsdale's Board leaves respondents free to place crèches anywhere except in the public parks, and even there to deliver the religious message of the Nativity in the form of their own or others' live expressions.

The accommodation Scarsdale has reached, even if it remains "free to strike a different balance than it has," *CSC* v. *Letter Carriers*, 413 U.S. at 564, is well within the bounds of the constitutional authority reserved to those elected to govern the municipality.

Respondents proclaim, as if it were a disputed proposition, that the free speech protection is more needful for minority views than for the majority's (Creche Comm. Br. 10; McCreary Br. 32). Agreeing vigorously with that, we have stressed that the free speech "protection" extends to vulgar words, Nazi doctrine, antireligious expressions, "adult" sexual presentations and other kinds of "content" widely or generally disfavored. And we have challenged respondents in three courts to say how their claimed right to compel a place for their symbol in the park could be withheld from proponents of swastikas, "adult" statuary, or a sign saying "Religion is the opium of the people." In the two courts below, respondents coped with that difficulty by ignoring it, as did the Court of Appeals. Here, both sets of respondents touch the subject with lightning glances—with inapposite or at best trivially partial observations about "fighting words" and with empty assurances that those inseparably related subjects can be ignored

while the Court decides today only about a crèche (Creche Comm. Br. 22-23; McCreary Br. 33-34).[8]

The cursory reference to "fighting words" does not so much as graze the problem. To begin with, it is doubtful that the quoted phrase could justify denial of free speech to Nazis or other antidemocratic speakers. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). Beyond that, as recognized in the brief for the United States, the principle to be sought here must embrace all kinds of controversial expression—on sex, politics, war and peace as well as religion—that are surely not "fighting words." So the serious concerns in the case, which respondents continue simply to neglect, must cover the question of power to admit to or exclude from the park varieties of signs and symbols that many or a majority of the residents find repugnant when they are stood on the public land.

The Solicitor General, cognizant that this is owed to the Court, acknowledges, and indeed presses, a need for "neutral principles" (Br. 26-27). He finds in this, however, a ground for affirming the Court of Appeals, which did not reach the need at all, and for enjoining the Village Board, which for many years (except for permitting the crèche) had permitted in its parks on a case-by-case basis only a few nonpartisan community symbols like those of the Red Cross and United Fund. The Solicitor General's own submissions, together with canons of law and good sense governing the efforts of municipal officials to proceed fairly and neutrally, help to vindicate the position of Scarsdale's Board.

The brief for the United States is both inconsistent and obscure in its quest for neutral rules or neutral principles. At

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8 Respondents McCreary *et al.* treat the prospect of less lovable symbols as chimeras (Br. 33). Others are more aware and more realistic. In Detroit, one of the places where crèches have been a lively subject for litigation in the past year, *e.g.*, *ACLU* v. *City of Birmingham*, 588 F. Supp. 1337 (E.D. Mich. 1984), a Nazi group has already claimed "equal treatment" with the sponsors of a Nativity scene for the display at the City-County Building of Hitler's picture on the anniversary of his birthday. *See* Appendix, *infra*. Of course, the question of principle would be here even if the people who would destroy free expression were less astute to claim their undoubted right to equal treatment under the First Amendment.

one point it states that Scarsdale is empowered to follow "neutral policies . . . and thereby either to permit or to exclude nativity scenes and *similar unattended structures*" (p. 10, emphasis added). In a later, similar passage, government counsel say: "If the Village chooses to adopt neutral rules that would have the effect of excluding the creche—along with *all comparable* unattended symbols—from the park, we believe it should be allowed to do so" (p. 22, emphasis added). The Government never says, however, what structures it deems "similar" or "comparable." Scarsdale has answered this question fairly and sufficiently in the one and only case of a controversial structure ever to come before the Board. The departure from long practice in allowing the crèche has been eliminated. The neutral principle thus achieved is that no controversial or sectarian symbols have been admitted to the parks. No more than the courts or other agencies must Scarsdale announce now specific decisions about prospective applications for swastikas[9] or Democratic Party campaign signs or myriad other things for which places have not yet been demanded. If a deviant or invidiously discriminatory case should ever occur, that would be time enough to tax the Village with failing to be fair and neutral. As of now, the above-quoted formulations of the Solicitor General are satisfied.

Elsewhere, however, omitting words like "similar" or "comparable," the Government appears to argue that Scarsdale must permit all symbols if it permits any; the brief speaks unqualifiedly about neutral rules "barring *all* unattended structures" (p. 24, emphasis added), about "other fixed, unattended symbols or structures" (pp. 24-25) and about "[a]n evenhanded distinction between unattended structures and live forms of expressive activity" (p. 26). While the Solicitor General's position is thus somewhat unclear, we note that there is no sound basis in law or good sense for demanding that Scarsdale and other municipalities choose between allowing all

9 The recurrent example of the swastika, used to make a point, has been over-simplified in our presentations. In addition to its most familiar, generally hated signification, it has served as a Jain and Buddhist symbol. *See* "swastika" in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed., unabridged 1939).

structures or symbols and allowing none. Nothing in the First Amendment or this Court's precedents confronts local officials with any such grisly choice. "It would make little sense to say that a city has an all-or-nothing proposition—either ban all [symbols] or none at all." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. at 532 n.10 (Brennan, J., concurring).

The power of municipalities to create limited or unlimited forums, coupled with the right to determine what objects shall stand on shared land and appear to express community sentiments, seems ample to repel the suggestion that parks as they have always been known must either be stripped of symbols or cluttered with everyone's sectarian or partisan or vulgar or otherwise contentious symbols. The difference between symbols to which no one seems to object and a symbol that sharply divides the community is reasonable, traditional and compatible with everyone's ample freedom to "speak" every imaginable view on religion, politics or anything else.

It bears emphasis that the principle of decision may be visible and neutral, as it is here, though the decision-maker does not anticipate and cover instances that have not yet arisen. As the Solicitor General acknowledges (Br. 20 n.11), Scarsdale's Trustees may evolve their principled position on a "case-by-case basis." There is no requirement that this lay agency write a constitutional treatise covering subjects never yet presented when it seeks to resolve in constitutionally permissible fashion an application for installation of a crèche in the park. This Court itself, with the supreme and final duty to expound the Constitution, often finds it prudent and wise to decide narrowly, on the specific facts, questions of the character here presented. *E.g., Widmar* v. *Vincent*, 454 U.S. at 277; *Lynch* v. *Donnelly*, 104 S. Ct. at 1361-62. To labor a truism only a little, the courts generally exercise their legal expertise in this fashion. A decision assigning liability to the purveyor of a mislabeled poison, *Thomas* v. *Winchester*, 6 N.Y. 397 (1852), was not less neutral and principled because the rule it adumbrated was not seen or made to embrace a dangerously defective automobile until 64 years later. *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).[10] Thus, the

10 *See* H. JONES, J. KERNOCHAN & A. MURPHY, LEGAL METHOD CASES AND TEXT MATERIALS 73 *et seq.* (1980).

fact that Scarsdale's Trustees have dealt reasonably and in a principled fashion with the only case or controversy of its kind ever to reach them is a full discharge of their obligation to obey the Constitution.

Because the only "case" to come before the Board is the crèche, only that unattended symbol has been forbidden. The result would seemingly be acceptable to respondents if the first rejected application had been for a hammer and sickle on May Day. But the principle is not different.[11] The decision is supported and supportable on neutral principles both actual and foreseeable. The Village's stance is in striking contrast with respondents' unprincipled view that the Free Speech Clause compels a place for the crèche while comparable things will presumably be excluded on grounds not even suggested to be consistent.

The Solicitor General argues that the Circuit, ordering that Scarsdale be enjoined, should be affirmed because the Board proceeded only on what the court held the mistaken ground of the Establishment Clause. This argument is unsound both factually and legally. In one of the many divergences among the briefs for affirmance, the Creche Committee observes (Br. 3) that the vote to deny permission reflected—as it did at least in part—the view that many found that the symbols standing on public land were not "neighborly" and were "offensive." The McCreary brief (p. 7) suggests that "no reasons" were given in 1982 and that the reported rationale was simply that the crèche in the park was "socially undesirable."[12] The fact is,

11 The Creche Committee (Br. 22) appears to find readily distinguishable "other vile and odious symbols which would sear the sensibilities and torture the soul of Scarsdale . . . ." Respondent Butler would object to a swastika in the park, even with a disclaimer sign, or to a sign with a hammer and sickle bearing the message "Religion is the opium of the people" (Butler Dep'n Tr. 67-69).

12 The McCreary respondents say over and over again, with ironical and misleading quotation marks, that the crèche was found to be "socially undesirable" as a structure left in the park and that this was the reason for the denial of permission. While it is not critical, the quoted phrase is repeated so insistently (McCreary Br. 7, 8, 11, 14, 16) that it must be marked for the perversion of the record that it is. The phrase is from a newspaper story, quoting respondent McCreary, who

of course, that the Board's minutes, like the Congressional Record, disclose a spectrum of reasons, including the Establishment Clause, for the Board's judgment (*see* Pet. App. 46a). Individual Trustees explained that allowing the crèche in the park, over widespread objections, was "unneighborly" (J.A. 135-36, 137, 143-44, 146, 163-64). The issue was treated repeatedly as calling for "human relations" advice rather than technically legal opinions (J.A. 38, 40). Not merely in terms of constitutional law, but as a principle of human relations, it was argued that the Board should not offend or affront objecting residents for whose benefit the Trustees govern the park (*id.*). These aspects of the opposition, eloquently stated by a group of Scarsdale's Christian clergymen (*infra*, p. 18), are among the facts stipulated in the record (J.A. 44).

But even assuming that the only stated ground had been the Establishment Clause, and assuming *arguendo* (contrary to Point II of our main brief) that this would not be in itself a sufficient basis for the Board's decision, the position of the United States as *amicus* would fail. Where the actions of the Village Board are sought to be overridden on grounds of constitutional law by a court's mandatory injunction, it is no argument for this extreme form of judicial control that the Village did not write a sufficient brief before being taken to court. Even the Congress and state legislatures, with their far greater legal resources, are not required to have formulated such justifications in advance of litigated tests. *Cf. Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464 (1981); *U.S. Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980); *United States* v. *O'Brien*, 391 U.S. 367 (1968). Decisions taken and rules made in far more sophisticated governmental bodies may be sustained though they are "the product of multiple and somewhat inconsistent purposes." *U.S. Railroad Retirement Board* v. *Fritz*, *supra*, at 181 (Stevens, J., concurring).

in turn was quoting a Trustee (Ullman) who had voted for the crèche in line with Mrs. McCreary's desires. He had used the quoted term to characterize the majority's stance, but then, as the cited story says but the McCreary respondents do not, had acknowledged that it was an "unfortunate phrase" that misdescribed the Board's position (Stip. Ex. 66, p. 38).

In short, with exceptions not material here,[13] the other branches and agencies of government are not treated by this Court as if the stated rationales for their actions were examination papers on abstruse questions of constitutional law to be graded pass or fail. Even on that kind of improbable footing, however, the decision taken by the defendant Trustees would be entitled to be sustained. What emerges from this record is a thoughtful, concerned, respectful and sensitive accommodation eloquently stated in nonlegal terms by a group of Scarsdale's Christian clergymen. The statement bears repetition (J. Ex. 157):

> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.
>
> This is not to say that religious symbols should not be seen in a community. Homes, media announcements and places of worship can be used by those wishing to call attention to their beliefs. In this way, the religious pluralism and freedom which we enjoy in this country are best served.

Those words sustain the Village's position in profound and neutral terms. This is in no remote sense a case of "discriminatory exclusion from a public forum." *Widmar*, 454 U.S. at 269-70. Until and unless Scarsdale, improbably, so much as approaches such a discrimination, its practice governing the few shared symbols in its shared parks, like the practice of municipalities everywhere, should not be disturbed.

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13 Where the questioned action is that of a supposedly expert administrative agency, the inadequacy of the expert judgment is not curable by new reasons the litigating lawyers may discover. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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February 1985

APPENDIX

Thursday, December 6, 1984
The Detroit News

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City's Nazis seek Hitler display

By Don Tschirhart
News Staff Writer

Detroit area Nazis are seeking City Council permission to display a large photograph of Adolf Hitler next April outside the City-County Building where authorities now permit a Christmas creche.

In a letter to the council yesterday, the Nazis said if the Nativity scene is permitted, then they have equal right to mount the picture on Hitler's birthday, April 20. If they are turned down, they said, they will call on the

■ Communities challenge courts on creches — 1C.

American Civil Liberties Union (ACLU) to help them "exercise our rights."

"It could be the opening of a battle," said ACLU Director Howard Simon, when told about the Nazis' plan.

"By their stubbornness and insistence on allowing government property to be used for religious purposes, the authorities might have backed themselves into a legal trap."

The creche was erected on a site on the southwest corner of the building, along East Jefferson, that the Detroit-Wayne County Building Authority has designated as a "public forum," in an apparent effort to over-

Continued on Page 6B

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Detroit petition

City's Nazis want Hitler display

Continued from Page 1H

come constitutional objections to religious displays on public land.

The authority, which operates the building, leases the site each Christmas season to the Central Business District Authority (CBDA) for $1 to display a Christmas nativity scene.

"When the building authority met to sell the Nativity scene to the CBDA in 1980," Simon said, "we told them they would have difficulty picking and choosing what would go on that site."

The City Council asked the city's Law Department for an opinion on the Nazis' request. "We should find out now what the legal ramifications are in light of other cities' problems with the Christmas scene," said Councilwoman Maryann Mahaffey.

In their letter, the Nazis said they sought to erect the Hitler photograph after learning recently that the City-County Building property could now be used to "further the interests of various political, social and religious organizations."

The letter was signed by Mark Heydrich, state organizer, in the name of Mike Kelverin of the S.S. Action Group, National Headquarters, Box 60, Dearborn Heights.

In another development, authority officials said they were expecting a request from a Jewish organization for permission to install a menorah, a nine-branch candelabra, to celebrate the Jewish Hanukkah holiday, which begins Dec. 19.